

Government in the United States

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Third Edition

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To

ART, JERRY, OLE, AND SCORES OF
MY OTHER FORMER STUDENTS WHO
NOW SERVE IN THE ARMED FORCES

Preface to the Third Edition



Before undertaking the present edition, I attempted to re-evaluate both the contents and the organization of the two earlier editions. As I wrote in the Preface to the first edition (1933), my reason for preparing the book was that "the excellent volumes now available are not arranged according to the plan I have followed in my teaching. There is no quarrel with the conventional national-state-local arrangement, an approach to the subject which might be characterized as hierarchical and geographical. But I have found the executive-legislative-judicial type of approach, placing the emphasis upon functions, a bit more satisfactory. This method . . . does not obscure the separate spheres of national, state, and local governments, [and] it emphasizes the growing unity of the whole process of government. It lends itself well to comparisons and contrasts, particularly in respect to national and state governments. Furthermore, it saves time in presentation. . . . I hope the rather large number of illustrations will serve to brighten up the pages and convey the realities of government."

The Second Edition (1937) I was encouraged to prepare because of the favorable response of teachers of American government, both in their comments on my first edition and in their willingness to use the book as a text. If my colleagues encouraged me, time and change, "inexorable and remorseless," forced me to undertake the Second Edition. That edition, although preserving the spirit and form of the original text, contained new material in almost every section.

It is now more than seven years since the publication of the Second Edition, and the need for changes, additions, and modifications is of too great importance to be ignored. During this time a number of improvements in the organization and the treatment of subject matter have been suggested, and many of these should be incorporated in a new edition of this work. It is of equal importance that an exposition of governmental reaction to the social and economic changes of the past few years be included in any overall study of American government.

With these considerations in mind, I have, without departing from the basic method of approach used in the earlier editions, completely revised the book. I would emphasize the following specific features:

1. The chapter on "The Distribution of Governmental Powers," a re-organization of the old one entitled "The Federal System."

2. Two new chapters, "Government and Labor" and "Agriculture and Conservation," expansions of the former single chapter on these subjects.
3. The new chapter on "The United States at War."
4. The new chapter on "The Obligations of Citizenship."
5. New material on a number of subjects, among them the White House Staff, the process of rule-making, and the personnel of Congress.
6. The attention to past and present participation of the United States in international affairs given at various appropriate points, particularly in the chapters on "The President," "Commerce and Business," and "The United States at War." Embraced within the discussions bearing on this ever-important subject is a range of topics from that prosaic administrative agency, the Universal Postal Union, to the highly political United Nations.

To the scores of my colleagues throughout the country who have sent me their suggestions I gratefully acknowledge my obligation. In particular I wish to thank Clarence A. Berdahl of the University of Illinois, Howard A. Calkins of the University of Texas, and my colleagues at the State College of Washington, Herman J. Deutsch and Hilton P. Goss. To those whose suggestions have not been followed I am ready to make answer—at the first Annual Convention of the American Political Science Association after the war shall have been won. Having found no resentment of my presumption in 1933, I continue "to associate myself with that gallant company of authors who, in expressing their indebtedness, nevertheless accept full responsibility for all errors their works may contain."

C.O.J.

New Year's Day, 1944

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To the Student



The Preface on the preceding pages is for your professor. The book is for you. In the twenty-odd years that I have taught American government, it has been my constant endeavor to make the subject clear, direct, interesting, and personal. These ends I have held in view as I was writing this book. The "we" and "our" which so frequently appear on its pages were used designedly, to "personalize" the subject, to bring it home to us, to make us feel that we have a stake in our government, to convey the idea that each of us is a unit, however small, in the process of government. Please accept these minor intimacies of the printed page as an indication of my desire to eliminate a measure of formality from the study of American government and to make it a joint, pleasant, and profitable excursion for professors and students.

C.O.J.

The Federal Constitution



IN ORDER to have a full understanding of the Constitution of the United States one should be familiar with American history prior to 1789, for the Constitution adopted in that year grew very largely out of America's political heritage from Great Britain, the relations of the colonies with that country, the long experience of the colonies in managing their internal affairs, and the partially successful effort of the states to form a union during the Revolution. Important as this history is, space does not permit a summary of it in this volume. This is no great loss for two reasons: first, because summaries are at best unsatisfactory and, second, because there are easily available a number of excellent books on the background of the Federal Constitution. Perhaps the best one for this purpose is A. C. McLaughlin's *A Constitutional History of the United States* (1935).¹

Having cited competent authorities on our constitutional background and being not entirely unhopeful that the student will seek enlightenment from at least one of them, this writer brings his introduction to the subject to a close with a brief note. The American States having proclaimed their independence in 1776, formed a loose Union under the Articles of Confederation. As a Confederation of States, they fought and won the Revolution, and, what is more important, they negotiated a most satisfactory peace. Not so long after the conclusion of peace there came an economic depression, and the Articles of Confederation, recognized by competent observers from the start as inadequate for a national government, revealed that the government they had established could not finance itself, could not raise armies, could not enforce its treaties, and, in general, lacked the powers which a respected government must exercise. Furthermore, the states were having internal troubles and Massachusetts actually experienced a rebellion. Consequently, a strong movement was started looking to the amendment of the Articles. Washington, Madison, Hamilton, and others who were gravely concerned for the future of the country finally prevailed upon the Congress to call a

¹ McLaughlin's, *The Confederation and the Constitution* (1905) is also very helpful. Among other good books on the subject are C. M. Andrews, *The Colonial Period* (1912); M. W. Jernegan, *The American Colonies* (1929); A. Nevins, *The American States during and after the Revolution* (1924).

convention "for the sole and express purpose of amending the Articles of Confederation."

I. THE PHILADELPHIA CONVENTION ²

The personnel of the Convention. The fifty-five delegates who represented the twelve ³ states at the Philadelphia Convention were above the average of those who had been sent to the Confederation Congress. About half of them were college graduates; some of them learned in the law and political institutions. A fairly high percentage of them had ability—a number of them marked ability—which had been demonstrated by practical experience. Washington, who hoped that the Convention would "adopt no temporizing expedients," was elected president of the body, and, while he took no great part in its deliberations, his prestige and character were of infinite value. The sage Franklin, a world figure, now mellow with years, let the younger men do most of the talking; but his mere presence was worth a great deal, and his kindly humor and wide experience in diplomacy helped ease some of the clashes among the other delegates.

James Madison was not only a practical young statesman who had seen service with the Virginia government and in the Congress of the Confederation, but he was also a thorough student of politics and history who had prepared himself for the Convention by reading everything he could find which had any bearing on American problems. A colleague described him as "a Gentleman of great modesty—with a remarkably sweet temper," and who, "from a spirit of industry and application which he possesses in a most eminent degree, . . . always comes forward the best informed man on any point in debate."⁴ To this same industrious and painstaking Madison, although he was not the official secretary, we are indebted for the best report of the work of the Convention, which deliberated in profound secrecy. New York sent as delegates the able Hamilton and two mediocre men. Hamilton's part in the framing of the Constitution has frequently been overestimated because of the very important part he took in the campaign for its ratification and in putting the new government on its feet after the Constitution had been adopted. His position at the Philadelphia Convention was ultra-conservative, and his extreme ideas were not shared by his fellow delegates.

Gouverneur Morris of Pennsylvania was able and daring, and he saw

² C. A. and M. R. Beard, *The Rise of American Civilization* (1930), pp. 309-335; M. Farrand, *The Framing of the Constitution of the United States* (1913); B. J. Hendrick, *Bulwark of the Republic: A Biography of the Constitution* (1937), pp. 11-99; A. C. McLaughlin, *The Confederation and the Constitution* (1905), Chs. XII-XVIII.

³ Rhode Island sent no delegates.

⁴ Pierce's notes, *Am. Hist. Rev.* (1898), III, 331.

clearly the need for a national government. It was he who, after the provisions of the Constitution had been agreed upon, put it in final form with his direct and forcible English. James Wilson of the same state, a learned lawyer and scholar, labored indefatigably for the national idea. Another Pennsylvania delegate, Robert Morris, had the national viewpoint and experience in public affairs; but he took no part in the discussions in the Convention. The three delegates from Connecticut—Johnson, Sherman, and Ellsworth—were men of very high caliber; and to the list of honest and able delegates we should add Paterson of New Jersey, Dickinson of Delaware, Randolph of Virginia, and the two Pinckneys of South Carolina. Probably half of the delegates were just average men who could contribute little to the work of the Convention, although some of these voted with the constructive statesmen on important questions before that body.⁵

Character of the delegates. A number of the delegates were owners of considerable property⁶ and had the very natural conservative leanings of their class. Nearly all of them had had considerable experience in both private and public affairs, an experience quite likely to banish radical political and economic ideas even from the tenets of enthusiastic reformers. Furthermore, this experience had made men who were naturally practical more practical, leaving little room for theories and dogmas on government. They had "lived a long time" during the critical and momentous years following 1775. They had seen the Declaration of Independence signed, its main purpose served; and now they saw some of their fellow citizens interpreting it too literally, and even thinking darkly and speaking threateningly about private property. They were dismayed at the possibilities suggested by Shays's Rebellion; they had seen enough of the "levelling spirit." The greater number of the delegates still professed to be believers in democracy, but in a democracy restrained by law, and a government with power to enforce the law. The men of 1776 had torn down the old structure—an essential performance in establishing our national existence; and now the Convention delegates, meeting in the same city, in the very same building, were to erect the new structure—a task infinitely more difficult. Very naturally, the Constitution they drafted contained no radical pronouncements on liberty; its purpose, declared in its Preamble, was to "secure the blessings of liberty," to "insure domestic tranquillity," and to "establish justice," through the medium of "a more perfect union." This purpose the framers were able to

⁵ McLaughlin, *op. cit.*, pp. 184 ff.

⁶ See C. A. Beard, *Economic Interpretation of the Constitution* (1913), for a full discussion of the delegates' private interests and an estimate of the extent to which these interests influenced their work in the Convention. For a severe criticism of Beard's analysis, see the review of his book by E. S. Corwin, *History Teacher's Magazine* (1914), V, 65-66.

achieve while, at the same time, they established a government more democratic than any of its contemporaries.

The Virginia Plan introduced. When the time set for the Convention arrived, only a few of the delegates had appeared, and some days passed before a quorum was present. The delegates who arrived on time were those who advocated a strong government, and they spent the days before the Convention could be formally opened in very important preliminary discussions as to how their aim could best be achieved. Consequently, on May 29, just four days after the Convention met for the first time, the Virginians, led by Madison but using Randolph as a spokesman, presented a plan which was taken as a basis for the work of the Convention and which contained a number of important features later given place in the Constitution.

ITS PROVISIONS. The Virginia resolutions⁷ called for representation in a bicameral legislative body either in proportion to the amount of money contributed by the states to the national government or to the number of free inhabitants in the states, "as the one or the other way may seem best in different cases." They stated that election to membership in the first branch of the national legislature should be by the people, and that the members of the first branch should choose the members of the second branch. This national legislature was to have all the powers the Confederation Congress held; others powers which the states were incompetent to exercise; the authority to negative state laws contravening national laws; and the power to use the armed force of the union against any state which failed in its obligations to that union. The resolutions declared for a national executive, to be chosen by the national legislature, who should "receive punctually" a fixed compensation, whose duties should be to execute the laws and act with some members of the national judiciary as a council of revision on legislative matters. This plan also called for a national judiciary with limited jurisdiction, but included among its powers the right to try suits in which foreigners were interested and all cases of impeachment. The resolutions stated further that state officers should take an oath to support the union; that the United States should guarantee the republican form of government to each state; and that new states should be admitted to the union by less than a unanimous vote of the national legislature. The sort of union thus proposed meant a great deal more than an amendment to the Articles of Confederation. It was no "temporizing expedient," but looked to the establishment of a strong national government.

ITS PROGRESS IN THE CONVENTION. The plan for a national government as proposed by the Virginia delegation was the basis of discussion in the Convention for several weeks. Its main features were acceptable to the

⁷ J. Elliot, *The Debates . . . on the Federal Constitution*, I, 143-145.

majority of the state delegations, although the provision for coercing the states was not preserved; for even its author, Madison, thought that "the use of force against a state, would look more like a declaration of war, than an infliction of punishment"⁸ and hoped that a better method of enforcing national authority would be found. The delegates of a minority of the states—New York,⁹ New Jersey, Delaware, and Maryland—were not in favor of so firm a union, and in their opposition to the principle of representation in proportion to free inhabitants or to funds contributed to the national government they were joined by the Connecticut delegates. These delegates were rather slow in formulating a plan of their own; but, on June 15, Paterson of New Jersey introduced a plan of union which represented the ideas of the greater number of the small-state delegates.

The New Jersey Plan. The New Jersey Plan¹⁰ was "purely federal" in character, offering important amendments to the Articles of Confederation, but leaving the states in their position of equality in the matter of representation. By the scheme proposed, Congress would have the authority to levy duties on imports, to regulate commerce, and to make requisitions on the states for money and direct its collection in case a state should not pay. There was to be, in addition to Congress, a plural executive and a judiciary. The most important proposal of the New Jersey Plan was that all acts of Congress and all treaties made and ratified under the authority of the United States "shall be the supreme law of the respective states." In this proposal the Convention later found the method by which national authority could be enforced without resorting to the cumbersome and dangerous method of coercing the states. The advocates of the New Jersey Plan probably did not see the significance of this part of their scheme of government, for they advocated that the federal executive be authorized to use force against states opposing or preventing the operation of federal laws.

The necessity for compromises. The large states wished to establish a new government, while the small states wished to remodel the old. The battle between them was primarily on the question of representation: the large-state delegates contended earnestly, cogently, and sometimes acrimoniously for proportional representation as set forth by the Virginia Plan; while the small-state delegates used every resource at their command for the principle of equal representation. When the Virginia proposal on representation was accepted for the first legislative body, the Southern States, naturally desiring as many representatives as possible, wanted the slaves counted as part of the population. Other states, having few slaves,

⁸ Elliot's *Debates*, V, 140.

⁹ The New York delegates, Hamilton excepted, held essentially the same views as the delegates from the small states. It is interesting to note also that New York was not the most populous state in 1787.

¹⁰ Elliot's *Debates*, I, 175-177.

did not want them counted. The commercial states wanted to give Congress considerable powers over commerce, but the agricultural states were afraid Congress would levy export duties on their products. Then, there was the question of the slave trade: the majority of the delegates were ready to abolish it—some of them were eager to do so—but the spokesmen of North Carolina, South Carolina, and Georgia, supported by some of the New England delegates whose fellow citizens were profiting by the slave trade, took a firm stand on the “right to import slaves.” Clearly, if the Convention was to accomplish any useful purpose, these differences between the large states and the small states, between the commercial states and the agricultural states, between the slave states and the states in which there were few slaves, and between the states which wanted to stop the importation of slaves and those which wished it continued, had to be compromised. Had the delegates been a body of theorists, each group in the Convention would have insisted upon the correctness and morality of its position and would have made no compromises; then there would have been recriminations, the Convention would have broken up in disorder, and the situation in our country would have been hopeless. Some of the delegates did leave the Convention because they could not endorse its proposals; but nearly all of the statesmen remained, spoke their minds freely and sometimes heatedly, compromised on numerous points in the end, and brought forth the Constitution.

1. THE GREAT COMPROMISE. Over the question of representation in Congress, the debate went on and on, with the discussion apparently leading nowhere. Wilson, speaking vehemently for proportionate representation, asked the small-state men if one hundred fifty citizens of Pennsylvania were required to balance fifty citizens of New Jersey;¹¹ while Martin wearisomely argued that “the corner stone of a federal government is equality of votes,”¹² and Franklin urged the Convention to implore “the assistance of Heaven.” Franklin’s solemn proposal was not followed for fear this tardy action would arouse suspicion on the outside that there was dissension among the delegates.¹³ Finally, the Connecticut delegates, who wanted a strong government but who were determined to secure some recognition of the states, came forward with very able arguments in support of a plan for representation in proportion to the population of the states in the first branch of Congress and equal representation in the second branch. The large-state delegates, seeing no other solution of the problem, accepted the scheme reluctantly and with misgivings; but, just the same, the most stubborn difficulty the Convention encountered was removed. This compromise had been previously proposed; but because

¹¹ Madison, *Writings* (Hunt’s ed.), III, 135.

¹² Elliot, *Debates*, I, 454.

¹³ *Ibid.*, V, 254.

of the fact that the Connecticut delegates were chiefly responsible for its adoption, it is frequently called the "Connecticut Compromise."

2. THE SLAVE THREE-FIFTHS OF A MAN. As to the vexing question of how to count the slaves in determining a state's quota of representatives in the first branch of Congress, it was agreed that each slave should be counted as three-fifths of a man. This solution of the problem had been proposed by Congress several years before in its recommendation to the states on the subject of the apportionment of the revenue.¹⁴ Nothing came of it at the time; but now it was brought out and accepted as a compromise between counting the slave one or zero, both in fixing the quota of representatives and in apportioning the direct taxes among the states. In speaking of the illogic of this arrangement, Wilson pointed out that, if the slaves were citizens, then they should be admitted as such; if property, then other property should be counted in making the apportionment. He admitted, however, and expressed the practical opinions of his colleagues in doing so, that compromise was the only solution for such difficulties.¹⁵

3. THE REGULATION OF COMMERCE. The interests of the Eastern and Southern states may not have been "as different as the interests of Russia and Turkey," as Butler put it;¹⁶ yet essential differences were clearly revealed as the delegates tried to arrive at an agreement on the regulation of commerce. Mason of Virginia said that the Southern states would be in a minority in both houses of Congress, and it was feared that the commercial states of the East would discriminate against the agricultural states of the South. One Eastern delegate stated frankly, but no doubt with exaggeration, that the sole motive for union in that section was a commercial one.¹⁷ As a result of these differences, Congress was given the very necessary power to regulate commerce and lay duties on imports; but the authority to lay export duties was denied in order to placate the Southerners, who feared that this power would be used to give Eastern merchants a monopoly on their staples.

4. THE SLAVE TRADE. An important phase of the commerce question had to do with the importation of slaves. Many members of the Convention thought that Congress should have the power to prohibit their importation. Madison was opposed to an admission in the Constitution "that there could be property in men."¹⁸ Mason, the owner of many slaves, spoke earnestly against the system, declaring that it robbed labor of dignity, discouraged arts and manufactures, made every master a petty tyrant. To him the slave trade was a "nefarious traffic," and he regretted

¹⁴ Elliot, *Debates*, I, 95.

¹⁵ Madison, *Writings* (Hunt's ed.), III, 407.

¹⁶ *Ibid.*, IV, 329.

¹⁷ McLaughlin, *op. cit.*, p. 262.

¹⁸ Madison, *Writings* (Hunt's ed.), IV, 306.

that the merchants of the Northeast had been drawn to it "from a lust of gain."¹⁹ But the states south of Virginia insisted that their economic development depended upon the importation of more slaves. The New England delegates were equally insistent that a simple majority of Congress be empowered to pass navigation acts and that the two-thirds requirement in the preliminary draft of the Constitution be stricken out. The states of the far South supported New England's demand in return for New England's support of a provision permitting the slave trade to continue until 1808.²⁰

A government over men and not over states. It will be recalled that the Articles of Confederation provided for a government which had no authority over individuals, and that Congress could do little more than make requests of the states. As the work of the Convention progressed, the idea was clearly developed that the national government should have direct control over individuals and not be dependent upon the states in any way. There were to be two governments: a national government, with certain powers which it would exercise quite independent of the states; and the states, independent of the nation, to be left to exercise the many powers remaining to them. The important point to note is that Congress would make laws, on subjects of national competence, which would apply to individuals; that national courts would interpret and apply these laws to individuals; and that a national executive would back the other arms of the government by seeing to it that individuals observed the laws. This arrangement meant that the national government would be a government worthy of the name; that it could levy taxes on individuals and enforce payment; that it could compel men to do military service when necessary; that it could try in its own courts individuals who violated its laws. It was no longer necessary to talk about coercing states; that cumbersome blunderbuss was dropped with sighs of satisfaction because a better method had been found.²¹

The law of the land. But what was to be done in case a state should pass a law in contravention to the national Constitution or laws? An early proposal was that the national authorities be given the right to veto such laws. This was discarded as impracticable and contrary to the general principles of the Constitution as they were being worked out. The New Jersey proposition with regard to the binding effect of national laws was now brought forward and unanimously adopted. The clause in its finished form reads: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be

¹⁹ *Ibid.*, 265, 267.

²⁰ On the compromises discussed above and on others not mentioned see Farrand, *op. cit.*, Chs. VII, X, XI.

²¹ McLaughlin, *op. cit.*, pp. 241 ff.

the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”²² Thus the Constitution was made a law binding upon state judges, a law which they must enforce in their own court rooms, even as against conflicting laws of their own state. The next clause of the Constitution provides that all officers, both of the nation and the states, shall take an oath to support the “supreme law.” The decisions to apply national laws to individuals and to establish the Constitution as law, binding on all officers, were among the most important decisions of the Convention, for without these arrangements it is not likely that the government would have long survived.²³

Other work of the Convention. Only a few of the more important questions before the Convention have been considered. The delegates agreed readily that there should be a national judiciary, but there was some difficulty in securing an agreement relative to inferior federal courts. Some said that the state courts could serve as such courts; others feared to trust the state courts. The result was another compromise. It was agreed that Congress should not be *required* but only *permitted* to establish inferior federal courts.²⁴ Another problem that sorely perplexed the Convention was that of determining how the President should be chosen. Provision was made for choice by electors, each state to have electors equal to the number of its representatives and senators in Congress—a point won by the large states. But in the event no candidate received the vote of a majority of the electors, then the House of Representatives should proceed to elect the President, the delegation from each state having one vote. The agreement that the vote in the House should be by states was a concession to the small states. The Convention had still other perplexing problems to decide. What powers should be given to the executive, legislative, and judicial departments? What should be the relation of these departments? What obligations should the central government assume for the states? What restrictions should be placed upon the states? Just how these and other points were decided by the Convention will appear in following chapters which explain the Constitution in some detail.

The attitude of the delegates toward their creation. The delegates probably had no idea that the Constitution they drafted would have such permanence; that it would be venerated by millions of Americans a century and a half later. The majority of the members could only feel that the Convention had done its best under the circumstances and that the country should ratify the Constitution they proposed. To those who hesitated to sign the instrument because of its defects, as they saw them,

²² Art. VI, sec. 2.

²³ McLaughlin, *op. cit.*, pp. 245 ff.

²⁴ Farrand, *op. cit.*, pp. 79-80.

Franklin told a humorous story of a French lady who said she never met anyone but herself who was always in the right. As for himself, he admitted that he had often had cause to question his own judgment and to change his opinion on important matters. "I confess," said he, "that there are several parts of this Constitution which I do not at present approve, but I am not sure I shall never approve them. . . . I cannot help expressing a wish that every member of the Convention, who may still have objections to it, would with me, on this occasion, doubt a little of his own infallibility, and, to make manifest our unanimity, put his name to this instrument."²⁵ All except three of the delegates present signed. The Convention gave the appearance of unanimity by adopting a resolution drawn up by Gouverneur Morris and proposed by Franklin: "Done in Convention by the unanimous consent of *the states present*."²⁶

Doctor Franklin sees the sun rise. As the thirty-nine hopeful delegates were putting their signature to the Constitution, "Dr. Franklin, looking towards the president's chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that painters had found it difficult to distinguish, in their art, a rising from a setting sun. 'I have,' said he, 'often and often, in the course of the session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the president, without being able to tell whether it was rising or setting; but now, at length, I have the happiness to know that it is a rising, and not a setting sun.'"²⁷

Distinctive features of the Constitution. The Constitution which saw the light of day at Philadelphia had certain distinctive, if general, features which may well be emphasized at this point. (1) The work of the delegates was so well done that the Constitution has survived to this day and is the oldest written constitution in the world. It has stood the test of time because it was made by wise and practical men to meet particular needs, and because these men made it sufficiently flexible to meet new conditions. (2) It is the briefest of all constitutions except that of the Third French Republic. The seven articles of the American instrument, establishing the three departments of government and outlining their powers, fixing the position of the states, decreeing national supremacy, providing for amendments, and prescribing the method of ratification by the thirteen original states, cover scarcely a dozen pages. (3) Although a pedant might criticize the arrangement of material in the Constitution, it stands as one of the best written of all instruments of government. The fact that there have been numerous heated disputes and almost innumerable litigations over the meaning of a number of its provisions is due much more to the importance of the Constitution—to the fact that it touches so

²⁵ Elliot's *Debates*, V, 554-555.

²⁶ *Ibid.*, 555.

²⁷ *Ibid.*, 565.

many phases of our economic and social life—than to possible defects in its composition. (4) Certain intentional omissions of the framers should receive notices. Did the states retain sovereignty? The Constitution gave no clear answer. Could a state secede from the Union? Only an ardent nationalist could find in the Constitution an unmistakably negative answer to this question. The framers avoided pronouncements on these points because they felt sure that denials of state sovereignty would ruin the prospects of ratification by the states. These questions were settled by the Civil War. (5) Finally, it should be observed that the Constitution contained very little that can be characterized as new. Practically all of its provisions were drawn from English laws and practice, colonial experience, state constitutions adopted during the Revolution, the Articles of Confederation, and so on.²⁸ Indeed, the language of the Constitution cannot be understood except by reference to the sources of the document. For example, the Constitution specifies that trials shall be by jury. But the Constitution does not define “trial by jury.” We must look to British and American practice in 1789 to learn that trial by jury meant a trial by a jury of *twelve* men, under the direction of a judge, and a unanimous verdict.

The Constitution submitted to the states. With the “salvation of the republic” at stake, the framers had not hesitated to go beyond their powers. They had been called to propose amendments to the Articles of Confederation, but in the Convention hall they worked a quiet revolution, devising an entirely different plan of government. They paid no attention to that provision of the Articles which specified that amendments could be made only by the consent of the legislatures of all the states; but they boldly presented their Constitution carrying the provision that when it had been ratified by conventions chosen by the people in as many as nine states it should go into effect between the states so ratifying. The framers believed that conventions were more likely to pass affirmatively upon their handiwork than were the legislatures, and they were determined that a few sovereign-conscious states should not prevent the majority from securing “the blessings of liberty” under the Constitution. The proposed Constitution, containing these important provisions for its ratification, was sent by the Convention to the Confederation Congress. It received a cool reception in that body, but after some discussion it was transmitted, without favorable comment, to the states for action by the state conventions.

The states ratify. Some of the states were prompt in ratifying the Constitution, but Virginia ratified only after a bitter fight against it led by the Revolutionary orator Patrick Henry. Without New York, the Union could hardly be expected to prosper, and the opposition in that state was very determined. Hamilton, Madison, and Jay wrote articles which were

²⁸ W. B. Munro, *The Government of the United States* (1936 ed.), pp. 70-71.

signed "Publius," and gave them to the leading newspapers of the state in the hope that the public could be brought to accept the Constitution after reading a systematic exposition of it. These campaign documents, known collectively as *The Federalist*, were written in haste, but this did not impair their quality. The authors stated the case for the Constitution vigorously, clearly, and convincingly. We sometimes speak ironically of campaign "literature" in our day, but *The Federalist* is a classic and the term literature suffers no violence in being applied to it. Although the popular vote in New York was against ratification, the state convention, earnestly importuned by Hamilton, Jay, and Livingston, and influenced by the fact that ten states had decided for the Union, gave the Constitution a narrow margin in July, 1788. In November, 1789, a few months after the new government had been organized, North Carolina came into the Union. The hope that the "inconsiderate people" of Rhode Island would not "fill up the measure of Iniquity" was fulfilled when that state ratified in May, 1790.²⁹

II. CONSTITUTIONAL AMENDMENTS ³⁰

The amending clause of the Constitution. Article V provides that "the Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . provided that no State, without its consent, shall be deprived of its equal suffrage in the Senate." It will be noticed that the framers threw aside the unanimity rule which applied to amendments to the Articles of Confederation, and that the supposedly "unamendable" provision with regard to equal representation in the Senate rendered the amending clause less objectionable to the smaller states.

SOME LEGAL QUESTIONS. From the above-quoted provision for amendment it is clear that amendments may be brought about in four different ways. In practice, however, except in the case of the Prohibition Repeal proposal of 1933, only one method has ever been used—proposal by two-thirds of both Houses of Congress and ratification by the legislatures of three-fourths of the states.

Certain legal questions have been raised in connection with this process. (1) Does two-thirds of both Houses mean two-thirds of the entire membership or just two-thirds of a quorum? In 1920 the Eighteenth Amendment

²⁹ A. J. Beveridge, *The Life of John Marshall* (1919), I, 319-480; A. C. McLaughlin, *A Constitutional History of the United States* (1935), Ch. XV.

³⁰ R. E. Cushman, *Leading Constitutional Decisions* (1940 ed.), pp. 1-8.

was attacked because the vote for it in the House of Representatives was less than two-thirds of the membership of that body. The Court held that the affirmative vote of two-thirds of a quorum met the requirement of the Constitution.³¹

(2) Does the President have the authority to veto a proposal for amendment submitted by Congress? This question was answered in the negative very early in our national history.³² The Constitution gives the President no part in the amending process. Executive vetoes extend only to legislation. In proposing an amendment to the Constitution, Congress is not legislating but is exercising what is called a constituent power.

(3) How long does a proposal for an amendment "stand"? It stands until ratified by three-fourths of the states. Of course, it may never be ratified by the requisite majority; but, technically, it is a standing proposal from Congress to the states. A state may reject the proposal and later reconsider and ratify. In *Coleman v. Miller*³³ the specific question was: Could the Legislature of Kansas, having rejected the Child Labor Amendment in 1925, ratify it in 1937? The Supreme Court of the United States held that the effect of the previous rejection upon the later ratification was a political question, and therefore a question not for the Court but for the Congress to answer. Since Congress had taken no action concerning the reversal of the Kansas Legislature, it can be assumed that the legislative change of heart met with the approval of Congress. If, however, Congress desires to place a time limit on its proposals to the states, it may do so. As a part of the Eighteenth, Twentieth, and Twenty-first Amendments Congress submitted a clause which would make them inoperative if they were not ratified by three-fourths of the states within seven years. The Supreme Court declared this limitation valid.³⁴ Further, in *Coleman v. Miller*, noted above, the Court strongly intimated that Congress had the power to declare dead, because of the passage of time or changed conditions, an unratified proposal in which Congress, at the time of presenting it, had not specified the number of years the states might have to ratify it.

(4) May a state having ratified an amendment rescind its action, provided three-fourths of the states have not ratified? The answer is "No." Ohio and New Jersey attempted to rescind their approval of the Fourteenth Amendment, and they were answered by a concurrent resolution of Congress binding them to their previous ratification. Many years later (we must refer once more to *Coleman v. Miller*) the Court seemed of the opinion that Congress had acted quite within the sphere of its authority in its action concerning these two states. In other words, the Supreme

³¹ National Prohibition Cases, 253 U.S. 350 (1920).

³² *Hollingsworth v. Va.*, 3 Dallas 378 (1798).

³³ 307 U.S. 433 (1939).

³⁴ *Dillon v. Gloss*, 256 U.S. 358 (1921).

Court is content to designate as political, and therefore within the power of Congress to determine, the question of the validity of a state ratification, whether the question is one of the validity of a ratification after an earlier rejection or of the validity of an attempt to withdraw a previous ratification.

Attempts to give the ratification process a more popular basis. In 1918 the voters of Ohio ratified an amendment to the constitution of that state which purported to give the people of the state a "referendum on the action of the general assembly ratifying any proposed amendment to the Constitution of the United States." The Supreme Court of the United States held that the process of ratification of amendments was limited to the two methods prescribed in the Constitution, viz., to ratification by state legislatures or by state conventions, and that the action of Ohio in attempting to prescribe a third method was contrary to this provision of the Constitution.³⁵ However, there could be no objection on constitutional grounds to giving the people of the states an "advisory referendum" on the question of the ratification of a proposed amendment to the Federal Constitution. This method has been employed in some states.³⁶ Tennessee attempted to give the people a more direct voice in the ratification of an amendment to the national Constitution by inserting in her own constitution a provision that no legislature should act on a proposed amendment to the national instrument unless elected after the proposal was submitted. But the Supreme Court held that the states had no authority to limit the ratification process in this way.³⁷ Here, as in the case of Ohio, we must observe that states can accomplish by informal action the purpose attempted by Tennessee. All that is necessary is that there be a "gentlemen's agreement" among members of state legislatures that they will take no action on a proposed amendment unless elected after the proposal is submitted.

The amending process alleged to be undemocratic. The illustrations just cited add considerable weight to the charge that the method employed in amending the Constitution is undemocratic. Furthermore, it is pointed out that it is mathematically possible for the legislatures of thirteen states, containing less than ten per cent of the population of the country, to defeat an amendment which is acceptable to thirty-five states containing more than ninety per cent of the inhabitants. On the other hand, it is possible for thirty-six states, with about one-half the total population, to

³⁵ *Hawke v. Smith*, 253 U.S. 221 (1920).

³⁶ See W. A. Robinson, "Advisory Referendum in Massachusetts . . .," *Am. Pol. Sci. Rev.* (1925), XIX, 69-73.

³⁷ *Leser v. Garnett*, 258 U.S. 130 (1922). It is possible that, should the questions raised in the Ohio and Tennessee cases be presented again, the Court would hold that they are for Congress, not the Court, to decide. At any rate, in *Coleman vs. Miller* (1939) the Court leaned strongly to the view that the entire ratification process is subject only to the control of Congress.

secure the adoption of an amendment which is opposed by the other half of the population residing in twelve states. This criticism of the system of amendment is not so serious as it might seem, for the sparsely settled states are not formed into a perpetual league against the more populous states or *vice versa*. Then, too, we should bear in mind that amendments are not determined by states alone, but by the states and Congress, in the lower house of which body the states are represented in proportion to population.

Many people have felt that the Congress and the state legislatures are not sufficiently responsive to the public demands for amendments. This, of course, is another phase of the alleged undemocratic character of the process of amendment. Figures are advanced to prove this point: the Sixteenth Amendment was introduced in Congress forty-two times before it was favorably voted upon by two-thirds of both houses, and the Seventeenth was voted down one hundred ninety-nine times before it was finally approved and sent to the states for ratification. It took nearly twenty years to get the Income Tax Amendment and more than three-quarters of a century to secure the constitutional provision for the direct election of senators. To these figures the other side answers: almost any member of Congress will introduce a proposal for an amendment to satisfy a few voters in his constituency, and a few score premature introductions is no argument against the amending system established by the framers of the Constitution. They answer further that, in recent years, there has been no undue delay in the adoption of amendments.

The democracy of convention ratification. Various proposals have been made looking to a more democratic method of proposing and adopting constitutional amendments, but none of them have aroused general interest. It may be that the great majority of citizens are satisfied with the degree to which democratic participation is possible in the amending process. In 1933, in the case of the Prohibition Repeal Amendment, Congress for the first time designated that ratification should proceed by the state convention method. There was general satisfaction with this plan, and it is probable that Congress will resort to it more in the future. It has an advantage over the legislative method in that the convention delegates are chosen for the sole and specific purpose of passing upon a proposed amendment. Furthermore, in choosing the delegates the people vote for avowed proponents or opponents of the amendment. The result is that the state conventions serve merely to ratify the popular will as expressed in the election of delegates. Thus, for all practical purposes ratification by state conventions is the same thing as ratification by popular referendum.

The twenty-one amendments. Although nearly three thousand amendments have been proposed in Congress, that body has passed favorably upon but twenty-six, of which number the states have ratified twenty-one.

These the student will find printed with any copy of the Constitution as parts thereof. Discussion of them will occur when we reach the topics to which they relate.

III. THE CONSTITUTION VITALIZED ³⁸

The Constitution of the United States consists of much more than the original instrument and its twenty-one amendments. Nearly all countries in this twentieth century have certain parts of their constitutions reduced to writing; but other and very important parts of these constitutions are found in statutes, judicial decisions, executive acts, and customs and practices. In the broader sense a constitution is that set of laws, rules, principles, practices, and understandings which determines the structure of a government, outlines its powers, and fixes the position of the individual in relation to that government.

For convenience we designate our written instrument of government the "Constitution," but its articles and sections and clauses, significant as they are, fall far short of revealing the American constitutional system in its entirety. A person unfamiliar with our plan of government would get a very incomplete understanding of it from a reading of the written Constitution. He would assume that the two Houses of Congress legislated with very little direction from the White House, and he would get not a suspicion of the activities of committees and caucuses. He would consider the presidential electors to be men charged with the very grave responsibility of electing the President, while in fact they are men of straw who register the popular will. He would not get much light on the President's use of the veto power, his war power, and his appointing power. A careful reader of the Constitution might get the impression that there are certain administrative departments, but he would get no information concerning departmental organization and powers, and the fact that the heads of the departments constitute the President's Cabinet would remain a deep secret. The Constitution would tell him very little about our judicial system, and would not inform him that the courts set aside statutes of Congress which in judicial opinion extend beyond constitutional bounds. And what would this stranger reading our written instrument of fundamental law learn of our political parties, their organizations, conventions, and primaries? It is obvious that he would have to look beyond the written Constitution, as we do, in order to get an adequate conception of the American political system.

Clarification, elaboration, and modification of the Constitution: 1. BY STATUTES. The framers of the Constitution very wisely left many impor-

³⁸ C. A. and Wm. Beard, *The American Leviathan* (1930), pp. 20-39; C. E. Merriam, *The Written Constitution and the Unwritten Attitude* (1931); W. B. Munro, *The Makers of the Unwritten Constitution* (1930).

tant details of governmental organization to be worked out by Congress and, to some extent, by state legislatures. The number, organization, duties, and relationships of the great executive departments were left to Congress to determine. The Interstate Commerce Commission, the Tariff Commission, and all similar administrative bodies were created by Congress and are not mentioned in the Constitution. The Constitution left the time, place, and manner of choosing members of Congress to the state legislatures and to Congress. The Twelfth Amendment, dealing with the electoral vote, is hardly more important than the act of Congress of 1887 which provides in detail for the counting of that vote and for the settling of disputes incident thereto. The Constitution provides that the presidential electors shall be chosen as the state legislatures may direct, and the fact that these legislatures have directed the people to choose them would be regarded almost as a revolution by the framers of the Constitution.

Some acts of Congress occupy as high a place in the public mind as do articles of the Constitution. The repeal of the Missouri Compromise (1854) aroused as much popular protest as would have a resolution of Congress canceling its constitutional obligation to guarantee to every state the republican form of government. By act of Congress the number of judges of the Supreme Court is fixed at nine, and by the same authority that number can be changed at any time; but when, in 1937, the President asked Congress to authorize an increase in the number of judges to fifteen (under certain contingencies), it was discovered that a very large segment of the public regarded the statutory requirement of nine as sacred. If Congress should repeal the civil service laws, a much more violent protest would go up from the public than is heard against such infractions of the Constitution as a failure to reapportion the seats in the House of Representatives following the decennial census. And what would the people's reaction be if the state legislatures should deprive them of their "right" to vote for presidential electors? So firmly is this popular method of choosing a President fixed in our constitutional system that the average citizen does not know that the state legislatures have any authority in the matter; he thinks that the Constitution of the United States gives him the privilege of voting for the President.

✓ 2. BY JUDICIAL INTERPRETATION. The courts have played a very conspicuous rôle in developing the Constitution, for the reason that they have been frequently called upon to interpret its meaning. The Constitution delegates certain powers to Congress, the President, and the courts; it places some limitations upon the powers of the states; and it explicitly guarantees a number of rights to individuals. A document which delegates and limits powers and declares specific rights very naturally lends itself at many points to judicial interpretation. The courts in this country have not been slow to assume this task—a matter which will be explained in a later chapter. The court which has the final word

on constitutional questions is, of course, the Supreme Court of the United States.

a. By the courts acting with Congress. The courts have gone a long way in helping Congress expand the Constitution. That has come about in this way. Congress enacts a statute on a new subject, or acts upon an old subject in a new way. Some interested party will very likely contest the validity of this statute in court. The court usually sustains the act of Congress and lays down the principles on which it is sustained. Acting under the principle thus announced, Congress will pass other statutes still further extending its powers. These, in turn, will probably be upheld by the Supreme Court which, at the same time, may announce additional principles, broadening the meaning of the Constitution. And thus the Constitution is expanded and developed "from precedent to precedent" by Congress and the Supreme Court. A few examples of this expansion are given in the next chapter, under the title "implied powers."

But let no one suppose that the Court is always ready to join Congress in a project to expand the Constitution. Our highest judicial tribunal has placed its veto upon an act of Congress levying an income tax, an act taxing employers of child labor, the National Industrial Recovery Act, the Agricultural Adjustment Act, and some three score other acts of Congress. In none of these cases was the Court giving the Constitution a broader meaning. There are distinguished authorities on constitutional law who say that the Court gave the Constitution an unduly restrictive interpretation in a few of these cases. For example, Professor Edward S. Corwin in his *The Commerce Power versus States Rights* attacks with clarity and vigor judicial decisions which narrowly interpret the power of Congress to regulate interstate commerce, maintaining that such decisions give the Constitution a narrow meaning never intended by its framers.

b. By independent action of the courts. The action of the courts is not always dependent upon initial action by Congress. The courts may interpret and expand (or contract) parts of the Constitution on which Congress has little or no authority to legislate. One example will illustrate this point. The Constitution forbids the states to pass any law impairing the obligation of contracts. This does not give Congress the authority to legislate on contracts, but it does give the federal courts jurisdiction over cases arising under this clause. In 1769 Dartmouth College was chartered by the English Crown. Some forty years later, the state legislature of New Hampshire passed a law changing the charter of the college. Up to that time, few people had thought of a charter of a college as a contract; but the Supreme Court, speaking through Chief Justice Marshall, held that such charters were contracts.³⁹ By the rule laid down in this decision, charters of business corporations became contracts which would

³⁹ *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

be protected by the federal courts against interference on the part of state legislatures.

3. **BY EXECUTIVE ACTION.** All of our great Presidents have given meaning to the Constitution; some have shaped it with vigor and gusto. The First President naturally fixed his stamp upon our system of government. Our policy of neutrality proclaimed by him was changed but little until the rise of Hitler. And who does not know that he originated the two-term tradition which remained unbroken until 1940? Jefferson had scruples concerning the constitutionality of the Louisiana Purchase, but he closed the deal, thus establishing a precedent. Jackson made the veto and the removal powers, being the first President to use them freely; and his vigorous action against Nullification in South Carolina furnished Lincoln with an example for dealing with recalcitrant states. Theodore Roosevelt interpreted the executive powers liberally, and Lincoln and Wilson, not without the approval of Congress, made the President's war powers.

4. **BY CUSTOM AND USAGE.** Our Constitution is made a living instrument, adaptable to the needs of successive generations, not only by the specific acts of those charged with the responsibility of government but also by the play of social and economic forces, the march of time, and even by accidents. The President's Cabinet—not mentioned in the Constitution and almost an accident in its origin—is a product of the years. The Constitution gives the President the power, "by and with the advice and consent of the Senate," to appoint various officers; but, as we shall learn in due time, practical politics has led to almost as many different interpretations of this power as there are different offices to be filled. The Constitution, except in its provision for impeachment, makes no mention of methods by which misfits may be removed from office. That process has been worked out by trial and error, by time and custom, and only now can it be said that the Supreme Court has spoken something approximating the final word on the subject. The strength of precedent was well illustrated by the opposition in many quarters to a third term for President Franklin D. Roosevelt and perhaps still better illustrated by his abandonment, in the face of popular disapproval, of his plan to have the nation celebrate Thanksgiving one week earlier. He won his third term for the Presidency but lost his third Thursday for Thanksgiving!

Political parties have made revolutionary changes in the system as outlined by the Constitution. The President's power has grown primarily on account of his position as party leader—a position which frequently enables him to play the dominant rôle in legislation and to win an organized support for his policies throughout the country. While aggressive Chief Executives would have lifted the office of President above the minimum stipulations of the Constitution in any case, there is no room for doubt that party leadership has made his position increasingly powerful.

The organization and the procedure of Congress are shaped largely by the exigencies of party politics. Parties have made the caucuses, the conventions, the primaries—institutions which have so much to do with the process of government, which are, in fact, parts of any realistic picture of government.

Slavery profoundly influenced the interpretation of the Constitution, produced a constitutional crisis, and caused the Civil War. Complete legal freedom was granted to the Negro by three constitutional amendments; but so strong was (and is) tradition against the legal equality thus guaranteed that the solemn words of the Constitution, particularly those of the Fourteenth and Fifteenth Amendments, are only partially effective in those states in which the Negro was once a slave. The Eighteenth Amendment prohibited the transportation and sale of alcoholic beverages. It developed that the beverage habits of many of the people and hostility on the part of others to the principle of Prohibition were stronger than the Eighteenth Amendment. Its failure led to its repeal. We may conclude, then, that usage has shaped our constitutional system hardly less than statutes of Congress and judicial decision; and further, that even the words of the written Constitution may not prevail against tradition, time, and habit.

"The Living Constitution." "The Constitution of the United States is not a mere lawyer's document," said Woodrow Wilson: "it is a vehicle of life, and its spirit is always the spirit of the age." It might be argued that this scholar was stating his ideal rather than a fact. Yet during the greater part of our history that ideal has been measurably attained. Even those who are concerned only with the written instrument must admit that its meaning is changing somewhat from time to time. There are few who will not agree that "due process of law," for example, has quite a different meaning today from what it had a hundred years ago. Judicial decisions, acts of the President and Congress, declarations of political parties, and even public opinion, change the meaning of the Constitution. Statutes of Congress are giving the Constitution a wider scope; practices and habits are changing it imperceptibly from year to year but quite perceptibly from generation to generation. The Constitution is changing and must change to meet the demands of the time. Naïve indeed is the American who imagines that the Constitution of his country is finished and immutable; fortunate is the country that such a Constitution exists only in the imagination of ignorant or simple-minded persons.

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The Distribution of Governmental Powers



I. TERRITORIAL DISTRIBUTION OF POWERS ¹

Unitary governments. In all countries the powers of government are territorially divided; that is to say, the central governments exercise certain powers, and local governments exercise certain other powers. If the central government has the authority to alter, change, or abolish the local government units, we say that the country has the *unitary* type of government. France and England are examples of this type of government. France has her local government areas—the departments, arrondissements, cantons, and communes; but the national government may do with them as it sees fit at any time. In like manner, the central government in England has complete authority over counties, cities, and other districts of local government. Such local areas are necessary for the proper administration of government, but they exist only under the authority of the central governments.

Federal governments. If the local government units of a country have powers independent of the national government, if the constitution of the country establishes them as entities and protects them from possible encroachments of the central authority, then we say that the country has a *federal* system of government. To this class belong the United States, Canada, Switzerland, and a number of other countries. The states in the United States, the provinces in Canada, and the cantons in Switzerland have powers independent of the national governments of those countries. The degree of independence these local units enjoy is, to borrow a word from Professor McBain,² “frozen” into the constitutions of the respective countries.

Advantages and disadvantages of the federal plan. Publicists have written learnedly about the advantages and disadvantages of the federal scheme of government. Its advocates, among whom are numbered Montesquieu, John Fiske, and Lord Bryce, say that it makes possible the union

¹ James Bryce, *The American Commonwealth* (1913 ed.), Vol. 1, Chs. XXVII–XXX; R. E. Cushman, *Leading Constitutional Decisions* (1940 ed.), 9–28; J. W. Garner, *Political Science and Government* (1928), pp. 346–356, 412–422; H. L. McBain, *The Living Constitution* (1927), Ch. II; W. F. Willoughby, *The Government of Modern States* (1936), Chs. XII–XIII; W. W. Willoughby, *Principles of the Constitutional Law of the United States* (1930 ed.), Ch. IV–X.

² *Op. cit.*, p. 34.

of commonwealths with somewhat dissimilar backgrounds and interests into a powerful state; and that these commonwealths, while retaining their local autonomy, secure the advantage of protection, commerce, and other services which a strong government is able to offer. It is claimed that this distribution of powers between the nation and the commonwealths prevents the rise of a single despotism, and that the people are thus able to protect their liberties. The commonwealths, being left to themselves in local affairs, serve as training schools in self-government. Experiments may be worked out in the local field which the nation would hesitate to attempt, as has been demonstrated in the United States, notably in North Dakota. On the other hand, the federal system is regarded by many as cumbersome and complex, as lacking necessary unity, as likely to be too rigid and, therefore, too slow in adapting itself to the needs of the time. Furthermore, the advantages claimed for local autonomy under the federal system may be had under the unitary system, if the central government prefers to be liberal with the local units, as is the case in England.³

Unitary and federal governments much alike. The difference between federal and unitary governments is more in fiction than in fact. Unitary England with her omnipotent Parliament cannot abolish the counties and boroughs as very active units of government—the people would not stand for it. Congress and the courts in the federal United States do quietly assume powers for the nation which the states formerly exercised, and only a few doctrinaires cry that the liberties of the people are in danger. Finally, we must observe that the tendency is away from federalism in all countries which have started with that type of government.⁴

Why the United States adopted the federal plan. The statesmen at Philadelphia in 1787 did not adopt the federal system of government because they considered it superior to the unitary model. They established the federal system because it was the only type their countrymen would accept. Here were thirteen practically independent states who had under the stress of war entered a league of friendship; but with the conclusion of peace they became increasingly jealous of the "sovereignty, freedom, and independence" which they had retained under the Articles of Confederation. Obviously, the only sort of government they would accept was one which delegated a few powers to a central body and left the others to the states—a federal government.

Powers delegated to the national government. The Constitution delegates certain powers to the national government. All other powers, subject to certain exceptions and limitations to be noted later, are left to the states; and to make this more certain the Tenth Amendment stipulates that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to

³ Garner, *op. cit.*, pp. 417-422.

⁴ McBain, *op. cit.*, pp. 36-37.

the people." The central government's powers are chiefly enumerated in Article I, section 8, of the Constitution. Included among them are the powers to tax, borrow money, coin money and regulate its value, declare war, maintain armies and a navy, regulate interstate and foreign commerce, control foreign relations, and establish post offices. In addition to these and a few other specific powers, Congress is given the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."⁵

Implied powers. Over the meaning of the clause just quoted, one of the greatest of political controversies was almost immediately started. Did the clause mean that Congress could pass only those laws which were absolutely necessary for carrying into execution its enumerated powers? Jefferson and his followers, who placed a strict construction upon the powers of Congress, vigorously affirmed that it did. Hamilton and his fellow nationalists liberally construed the powers of Congress and said that Congress might pass any laws which in its judgment were proper for carrying into execution those powers which were expressly granted to it. They cogently argued that Congress, having been given the power to legislate for specified *ends*, was authorized by the clause in question to use any *means* not prohibited by the Constitution for accomplishing those ends; that by implication Congress was authorized to use its discretion in passing laws which would give it the most effective control over the important matters submitted by the Constitution to its charge. In vain the Jefferson crowd pointed out that such an interpretation of the Constitution would give the national government almost unlimited power and would lead to encroachment upon the powers reserved to the states. While Jefferson's arguments were in the main sound, the nationalists, or Federalists, as they are commonly called, had their way, and under this doctrine of "implied powers" chartered the First Bank of the United States in 1791.

McCulloch v. Maryland. The charter of the Bank expired in 1811 without its constitutionality ever having been tested in court. The Second Bank was chartered in 1816, and it very quickly incurred the enmity of large sections of the country as a "money trust" and what not. Eight states passed laws restricting the activities of the Bank in various ways. Maryland placed a heavy tax upon the notes of all banks not chartered by the state. The cashier of the branch Bank of the United States in Baltimore, McCulloch, refused to pay the tax, and the State of Maryland sought to recover the penalties prescribed for nonpayment. When the case came to the Supreme Court of the United States, it was argued for nine days by six of the ablest American lawyers.⁶

⁵ Art. I, sec. 8, cl. 18.

⁶ Cushman, *op. cit.*, p. 10, note.

CHIEF JUSTICE MARSHALL'S DECISION. The decision in this case is probably the ablest of all opinions delivered by America's greatest Chief Justice. In answering the question, "Has Congress the power to incorporate a bank?" he stated that "the government of the Union, though limited in its powers, is supreme within its sphere of action." "Although, among the enumerated powers of government," he continued, "we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. . . . It may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means." He goes on to say that the Constitution "does not profess to enumerate the means by which the powers it confers may be exercised; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. . . . We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." ⁷

SIGNIFICANCE OF THE DECISION. In holding that the Congress might charter a corporation—in this case a bank—as a means of facilitating the execution of her express powers with regard to revenues, the post office, war, and other matters, Chief Justice Marshall gave the highest judicial sanction to a principle of constitutional construction which has been of incalculable value in expanding the powers of the national government. Without the acceptance of this principle, it is difficult to see how we could have developed into a strong nation. We have noticed that very strong arguments were made against the doctrine of implied powers, and we cannot say that they did violence to the actual words of the Constitution; but had this opposing interpretation of national powers prevailed, we would have been turned back toward the Confederation and the national government might have come to be helpless and contemptible under certain contingencies. At any rate, the doctrine is firmly fixed in our constitutional system, and it is given wider application now than ever.

⁷ *McCulloch v. Maryland*, 4 *Wheat.* 316 (1819).

Some illustrations of implied powers. Acting upon this principle, Congress has established postal savings banks as one of the means of exercising its delegated financial powers; it has created such parks as the Gettysburg Park, presumably as a means of carrying its war power into execution; it has excluded objectionable matter from the mails as a means of carrying into execution its postal power; it has made paper money legal tender as a part of its power to borrow money; it has even protected the federal banks (a means) from the competition of state banks by giving them the authority to execute wills; and in almost innumerable other ways has turned to good advantage the theory so ably expounded by Marshall.⁸ The layman has some difficulty at times in finding the particular delegated power which is served by an act of Congress which is supposed to be a means of carrying it into execution; but he should avoid the common error of assuming that under implied powers Congress may do anything it pleases. Congress cannot pass a uniform marriage and divorce law, a general law regulating the incorporation of cities, a law limiting state debts, or laws relating to a wide variety of other subjects, and it cannot do so because there is no clause in the Constitution from which the power to take such action can be implied.

Powers of the states. While it is true that the national government has acquired by a liberal construction of the Constitution a great many powers which our forefathers probably had no idea it would ever possess, there is no truth in the assertion commonly made that the states have practically no powers left. The nation has those powers which are delegated to it and those which are fairly implied from those delegated; the states have all other powers except those few which they are prohibited from exercising. The powers of the states are largely inherent and undefined. Because the Constitution deals almost entirely with national powers and because its powers over foreign relations and war furnish a great deal of the drama of government, we are likely to forget the great number of important powers left to the states. The states have the power to tax; to borrow money; to make and administer our great bodies of civil and criminal law; to exercise very wide powers in connection with the health, safety, and well-being of their inhabitants; to establish schools and supervise education; to charter and control corporations; to make practically all of the suffrage and election laws; to administer charities and correction; to regulate trade within the state; and to make all rules and regulations respecting local government. This by no means exhausts the list of the powers of the states, but it is sufficient to show that they are comprehensive and important.

⁸ Some authorities refer to a particular type of implied power as a "resulting power," defining it as a power which is not implied from any particular clause of the Constitution but which may be inferred from a number of clauses grouped together.

State government close to the individual. Despite the rapid growth of the powers of the national government in the last fifty years, the individual still has much more contact with his state and local government. His state government is with him from the cradle to the grave. It issues his birth certificate and his burial permit; and between the Alpha and Omega of his mortal existence it protects his rights, penalizes his delinquencies, and regulates his conduct in various ways. If he goes hunting, it is under state authority. If he gets married, he must have a state license. If he is divorced, it is by a decree of the state court. Before he enters a profession, he must satisfy the state that he is competent. The reader may continue the enumeration!

Exclusive powers of the national and state governments. The greater number of the national government's powers are exclusive. Its powers over war and peace, treaty making, foreign commerce, coinage, and naturalization are examples of this. Certain powers of the states are exclusive also. The laws relating to wills, torts, domestic relations, and the like, are exclusively state laws. The same is true of our ordinary criminal law, although the national government prescribes penalties for those who violate its postal laws, its laws regulating interstate commerce, and so on.

Concurrent powers. Over some matters the states and the nation have concurrent powers. Obviously, both must have the power to tax and to borrow money. Then the states are permitted to exercise certain powers which are delegated to Congress, provided the states exercised these powers before 1789, and provided further that their continued exercise of them does not conflict with acts of Congress on those subjects. Thus, although the Constitution gives Congress the power to regulate interstate commerce, the states are permitted, in the absence of Congressional legislation, to enact measures which touch the current, and sometimes actually retard the flow, of interstate commerce. The clearest illustration of concurrent powers was found in the exceptional provision of the Prohibition Amendment, the enforcement clause of which read: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The limits of governmental powers: 1. ON THE NATIONAL GOVERNMENT. The English government has no legal limits; its limits are moral and physical only. In contrast to the English, we have very definite legal limits both on the national government and the states. The national government is limited not only by the fact that it is a government of delegated powers, but also by a number of express prohibitions. These prohibitions are found in certain parts of the original Constitution, but chiefly in the first ten amendments. The national authorities are forbidden to abridge the freedom of speech or of the press; to establish a religion or prohibit the free exercise thereof; to deny the right of trial by

jury; to deprive any person of life, liberty, or property without due process of law; to pass any bill of attainder or *ex post facto* law; to mention only a few of the prohibitions.

2. ON THE STATES. The Federal Constitution restricts the states by addressing to them a number of prohibitions. The states are prohibited from entering into treaties and alliances and from exercising certain other political powers which would obstruct and embarrass the central government in conducting its affairs. More important, perhaps, the Constitution places them under a number of prohibitions concerning personal and property rights. As examples of these, we cite the prohibitions against any state's passing bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts. Especially important is a provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property, without due process of law. It is now clear that certain provisions of the Federal Constitution impose restrictions upon the national government and that certain *other* provisions impose restrictions upon the states and that some of these restrictions are identical, for instance, the prohibition of *ex post facto* laws.

3. POWERS RESERVED TO THE STATES AND TO THE PEOPLE. By the terms of the Tenth Amendment, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This provision was designed to make certain that the national government would not draw unto itself powers not granted to it. Some twenty-five years ago, the Supreme Court of the United States became so concerned over what it conceived to be the tendency of the national government to encroach upon the powers reserved to the states that it evolved a rather novel theory to protect them—the theory that the national government could not exercise the powers delegated to it in such a manner as to curtail the powers reserved to the states. For example, in the case of *Hammer v. Dagenhart* ⁹ the Court, in holding that Congress had not the power to exclude the articles of child labor from interstate commerce, gave as one of its reasons the fact that such exclusion would result in restrictions on the employment of children in factories, a condition with which only the states had the power to deal. To the layman and to a number of authorities on constitutional law, it seemed that the Court had said, in effect, that a power *delegated* to the national government may at the same time be *reserved* to the states, or at least limited because of the powers reserved to them. In 1941 the Supreme Court in a far-reaching decision said that the *Dagenhart* case "should be and now is overruled." It stated further that the Tenth Amendment does not deprive "the national government of authority to resort to all means for the exercise of a granted power which are appropriate and

⁹ 247 U.S. 251 (1918).

plainly adapted to the permitted end.”¹⁰ We are thus brought back to Chief Justice John Marshall’s broad interpretation of national power.

May a subject not delegated to the control of the national government, and one which is not reserved for the control of the states, be dealt with by Congress? The Supreme Court answers “No,” explaining that a matter not within the regulatory authority of either the states or the nation is reserved by the provisions of the Tenth Amendment to “the people” of the United States.¹¹ Of course, if the people desire to do so, they may amend the Constitution, giving Congress authority over the matter in question. It should be added, however, that amendments are usually unnecessary, for a broad construction of delegated powers, a construction now followed more than ever by the Supreme Court, has the result of giving Congress the authority to take practically any action the national well-being seems to require.¹²

Supremacy of national authority. It has been shown that the Constitution establishes a federal system of government by delegating certain powers to the national government and by reserving other powers to the states. In a sense, the states are supreme in their sphere of activity, just as the national government is supreme in its sphere. But there is a difference. The Constitution, acts of Congress in pursuance thereof, and treaties are the supreme law. The national authorities, final decision usually resting with the Supreme Court, themselves determine their powers under the Constitution; while the states cannot determine the extent of their powers but must accept the decision of national officers on these points. For example, Congress passes an act regulating commerce. Interested parties may contest the constitutionality of the act in the federal courts, arguing that it invades the states’ province of government, but the decision of the Supreme Court settles the matter. On the other hand, when a state legislature enacts a measure, it is subject to review not only by its co-ordinate branch, the state courts, but it may also be carried to the Supreme Court of the United States. Thus, in conflicts of authority—and they are numerous—between the state and national governments, the national government is the judge—the judge in its own case. What, then, becomes of our theory that the national government has only delegated powers and those fairly implied from the powers delegated? Would it not be possible for Congress to enact, the Supreme Court to sustain, and the President to enforce, any law whatsoever, however much it might exceed the powers granted the national government? Theoretically, this is possible, and it must be admitted that the national powers have been considerably expanded already; but it can hardly be demonstrated that they have been expanded arbitrarily. The Supreme Court, in particular, has often stepped

¹⁰ *United States v. Darby*, 312 U.S. 100 (1941).

¹¹ *Kansas v. Colorado*, 206 U.S. 46 (1906).

¹² W. F. Dodd, *Cases and Materials on Constitutional Law* (1941 ed.), p. 415, note.

in to preserve the rights of the states. But, whether exercised with or without restraint, the power of the national government to judge its own competence as well as that of the states gives ample justification for the use of the term "national supremacy."

How national supremacy is maintained. Supremacy of national authority is maintained through the authority of Congress to pass all laws necessary for promoting the activities of the central government; through the authority of the President to see that the laws are faithfully executed; and through the federal courts, whose power extends to all cases in law and equity arising under the Constitution, laws, and treaties. The power of the federal courts to declare invalid state laws which conflict with national authority is of particular importance in this connection. A complete explanation of the system by which supremacy is maintained would require considerable space and involve us in technicalities. A few illustrations will serve the purpose better.

1. **STATES MAY NOT TAX NATIONAL AGENCIES.** In the first part of this chapter (p. 24) we learned that the State of Maryland attempted to tax the Baltimore branch of the Bank of the United States. At that point, we reviewed that part of the decision in which the authority of Congress to charter the bank was upheld. Here we shall consider the part in which the act of the legislature of Maryland, taxing the bank, was held void. The Constitution does not expressly prohibit the states from taxing such agencies of the national government. But Chief Justice Marshall, speaking for a unanimous Court, said that the power to tax was the power to destroy; and that, if the states may tax one instrument of the national government, they may tax any and every other instrument "to an excess which would defeat all the ends of [the national] government." As an "unavoidable consequence of the supremacy which the Constitution has declared," he denied that the states had any power, "by taxation, or otherwise, to retard, impede, burden, or in any manner to control the operations" of the national government in carrying into execution the powers granted to it by the Constitution.¹³ Thus the states may not, even in the exercise of the very highest "reserve" power of taxation, interfere with the operation of a convenient, much less a necessary, agency of the national government. But the rule is applied to both state and national governments. The Supreme Court has held that Congress may not tax state governmental agencies.

2. **STATES MAY NOT INTERFERE WITH NATIONAL OFFICERS.** Some sixty-five years ago, a federal revenue officer in Tennessee, in the discharge of his duty, killed a man and claimed it was done in self-defense. He was indicted for murder by the state authorities and held for trial in the state

¹³ *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

courts. But by the provisions of a statute of Congress, upheld by the Supreme Court of the United States, such cases were to be tried in federal courts. Consequently, the federal revenue officer was able to have his case removed from the Tennessee court and tried in the federal district court.¹⁴ A case of much greater significance is that of Neagle, a deputy marshal of the United States in California. He had been assigned by the Attorney General, acting for the President, to protect Mr. Justice Field, whose life was threatened by a lawyer who was enraged at the judge because of an adverse decision. Finding the judge in a railroad restaurant, the would-be-murderer was about to draw his revolver; but Neagle acted more quickly and shot him dead. Neagle was arrested by California authorities and indicted for murder. He was then released upon a writ of *habeas corpus* by the federal circuit court. There was no statute of Congress which clearly authorized the sort of duty Neagle was performing in protecting Judge Field, but the Supreme Court held that the authority of the President to see that the laws of the United States were faithfully executed was sufficient authorization for Neagle's appointment to protect the judge. Said Justice Miller in giving the Court's decision: "It would be a great reproach to the system of government of the United States . . . if there is to be found within the domain of its powers no means of protecting the judges in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably."¹⁵

3. STATES MAY NOT INTERFERE WITH THE TRANSPORTATION OF MAIL. Another illustration of national supremacy is found in the prosaic activity of transporting the mail. The State of Maryland passed a law requiring drivers of motor vehicles to pass an examination demonstrating their competence and to pay a license fee of three dollars. A driver of a mail truck over the post road from Mt. Airy, Maryland, to Washington, was arrested by Maryland authorities for not having complied with the provisions of this law. The Supreme Court of the United States held that the application of the requirements of the Maryland driver's license law to an employee of the Post Office Department was an unwarranted interference with the transportation of the mails; for "it lays hold" of government servants "in their specific attempts to obey orders, and requires qualifications in addition to those that the government" of the United States has deemed sufficient.¹⁶ It is possible, however, that the Supreme Court would permit a state law against reckless driving to be applied to a driver of a mail truck, as the states are allowed considerable leeway in protecting the safety of their inhabitants. Indeed, in 1817, a high con-

¹⁴ *Tennessee v. Davis*, 100 U.S. 257 (1880).

¹⁵ *In re Neagle*, 135 U.S. 1 (1890).

¹⁶ *Johnson v. Maryland*, 254 U.S. 51 (1920).

stable of Philadelphia was held not guilty of obstructing the mails when he stopped a mail stage "going very rapidly through Market Street . . . at a rate of eight or nine miles an hour."¹⁷

4. PRESIDENT CLEVELAND SEES THAT THE LAWS ARE "FAITHFULLY EXECUTED." When a great strike of railway employees obstructed the transportation of the mails in the vicinity of Chicago in 1894, and when Governor Altgeld, who sympathized with the strikers, would do nothing, President Cleveland sent troops to guard the mail trains and to keep open the channels of interstate commerce. This action was severely criticized by the friends of organized labor and by others who were opposed to the use of Federal troops in such disturbances unless state authorities had requested the national government to intervene; but there is no doubt that the President was acting within his power to execute faithfully the laws of the United States.

II. FUNCTIONAL DISTRIBUTION OF POWERS¹⁸

The three main branches of government. Just as the powers of government are territorially divided, so are they divided according to functions. We commonly divide the work of government among the legislative, executive, and judicial branches. Many authorities, particularly French jurists, consider the judicial power as a part of the executive power. F. J. Goodnow holds a somewhat similar view;¹⁹ while another contemporary adds the electoral and administrative functions²⁰ to the three with which every school boy is familiar. Neither of these views should be lightly put aside, but American constitutions, both national and state, follow the traditional threefold functional division of powers into legislative, executive, and judicial departments, and that method is, therefore, best adapted to our purpose.

Parliamentary government. In those countries in which the executive department is controlled by the legislative branch, the government is said to be *parliamentary*. England, the members of the British Commonwealth of Nations, and nearly all of the democracies of Continental Europe have this system. In these, the executive departments are conducted by "cabinets" or "ministries" under a more or less active control of the legislative bodies. Almost invariably the officers of the executive branch are members of one of the legislative bodies. They hold office only so long as they have the confidence of a majority in the most popular branch of the parliament. It is thus apparent that parliament is supreme

¹⁷ *United States v. Hart*, 1 Peters (U.S. Cir. Ct.), 390 (1817); Cushman, *op. cit.*, p. 21, note

¹⁸ *The Federalist*, XLVII-LI; Garner, *op. cit.*, pp. 322-344, 423-445, 589-595; W. F. Willoughby, *Government of Modern States* (1936), Chs. XIV-XV.

¹⁹ *Politics and Administration* (1900), Chs. I-II.

²⁰ W. F. Willoughby, *op. cit.*

in such governments and that the executive department is conducted by an executive committee or cabinet composed of members of the parliament.

Presidential government. The parliamentary system had not been fully developed in England when our state and national constitutions were being made, nor did the Americans fully understand it as it was then operating. Furthermore, constitution makers in America were interested in (placing checks on each department of government in order to prevent governmental tyranny, and conservative men wished to devise a plan of political organization which would secure private property from hasty action of legislative bodies.) It was but natural, then, that the "Fathers" should cast about for a new system. (In the middle of the eighteenth century Montesquieu had written that liberty could be found only where the powers of government were distributed among the legislative, executive, and judicial departments, each having a check upon the other two. This doctrine was very influential with the framers of state constitutions during the period of the Revolution. The framers of the Federal Constitution accepted it as a practical solution of the problem of the distribution of powers for the national government; and they established the three great departments, with their "checks and balances," forming our *presidential* system.) A number of the South American countries have established somewhat similar systems of government.

The separation of executive, legislative, and judicial powers. The complete separation of executive, legislative, and judicial powers has never prevailed in practice, despite the two-century hold the theory has upon the minds of men. Neither Montesquieu, who first gave the precept classic expression and most effectively recommended it to the attention of Americans, nor the political craftsmen who incorporated it into our constitutions believed that an absolute separation of powers was possible or desirable. In a brilliant article in *The Federalist* (XLVII) (Madison demonstrated that the celebrated Montesquieu meant only that there could be no liberty if the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department.) Madison showed also that the framers of the state constitutions had not isolated and insulated each department of government in a corner of the governmental triangle.) Madison held strongly to the view that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to free government, can never in practice be duly maintained."²¹ A number of "connections and blendings" are very definitely provided for in the Constitution. Here are a few examples: The acts of Congress are made subject to the executive veto. Treaties made by the President must meet the approval of two-thirds of the Senate, and his appointments must be submitted to that body for confirmation.

²¹ *The Federalist*, XLVIII.

Congress determines the appellate jurisdiction of the Supreme Court, and that Court may declare acts of Congress void. Congress has often declared a policy and left to the President or some other administrative authority the duty of promulgating rules and regulations (a legislative power) to carry that policy into effect. In like manner, Congress has frequently clothed administrative bodies with powers essentially judicial. There are thousands of pages of regulatory codes promulgated by administrative authority, and so commonly does the same authority act in a judicial capacity that in a single year an administrative department may determine more civil cases than do all the federal courts.²² In a realistic view of the total process of government there is such a blending of powers, functions, and duties that the lines which separate the three branches all but fade from view. Government might be compared to a machine which functions only when it is in gear with all of its parts synchronized and in motion so that it operates as a unit.

Politics and the separation of powers. In addition to the exceptions noted above, political practice has further modified the principle of a rigid separation of powers. One branch of the government sometimes dominates another. Lincoln used almost dictatorial powers during the Civil War. Congress was in the saddle during Reconstruction days. Theodore Roosevelt occupied the center of the stage during his presidency, and Wilson dominated the scene during his administrations, even before the outbreak of World War I. During the War, he was given and exercised even greater powers than Lincoln had exercised. With the inauguration of Franklin D. Roosevelt, presidential leadership, on account of unprecedented crises, reached a peak never before attained in peace time. The entrance of the United States into World War II was the signal for further extension of executive power. In theory, Americans hold to the dogma of the separation of powers, but they trouble themselves little about its application in the conduct of their government. We like to have aggressive Presidents who lead Congress or even force that body to act. Democrats complain of executive usurpation when the Republicans have an occupant of the White House who takes it upon himself to be the chief legislator as well as the chief executive; Republicans, without laughing, make similar charges of presidential autocracy when the aggressive head of the government happens to be a Democrat. The truth is that American party government naturally makes the President the leader; and, if the Executive relishes or has a capacity for that rôle, he gains the ascendancy over Congress with relative ease. Of this we shall learn more later.

The future of the presidential system. For more than a century and a half the presidential system has served us. This is not conclusive proof of its adequacy. The fixed and overlapping terms of President and con-

²² W. F. Dodd, *Cases and Materials on Constitutional Law* (1941 ed.), p. 142, note.

gressmen bring about occasional deadlocks between the two branches of government. During the century and more that we had a negative conception of government, a conception expressed in the words "that government is best which governs least," the system gave rather general satisfaction. With the growing demand, indeed with the necessity, for substituting for a government of restraint a government which would provide services, the system displayed certain weaknesses, the chief of which was that there could be no certainty that the executive and legislative branches could unite upon a program of affirmative action. As was shown in the last paragraph, this problem has sometimes been solved by a strong President who with popular backing took the reins. By the use of favors and threats he could often succeed in getting action from Congress. However, the method is extra-constitutional and it is improvised. If Congress will not "go along" with the President, there is nothing to do but wait for the next election. To say the least, a most regrettable situation would be created if, for example, the people and Congress wanted to change leaders in war time and could not do so because the President's term had two more years to run. To put it shortly, under our system of government there is no constitutional means by which the executive and legislative bodies can be brought to unity of action. To date the occasional deadlocks we have suffered have been irritating and embarrassing but none has been fatal. It is quite possible that we are no longer able to afford the luxury of a governmental stalemate and that we should look about for means of preventing one. The most obvious solution lies in an American modification of the parliamentary system.

III. THE PLACE OF THE JUDICIARY IN THE AMERICAN SYSTEM ²³

The judiciary fills a most important place in our governmental structure. The details of its organization and procedure are reserved for a later chapter, but it is essential to an understanding of the workings of our type of government that a few of the main functions of the judiciary be considered here.

Basic functions of the courts. In the first place, there must be some authority to draw the line between the powers of the national government and those of the states. The Constitution draws the line in general terms, but these terms are in constant need of interpretation and reinterpretation. Conceivably this function might have been entrusted to some other authority; but the wording of the Constitution, the intention of its framers, and subsequent practice appropriately make it a judicial function.

²³ C. A. Beard, *The Supreme Court and the Constitution* (1912); C. G. Haines, *The American Doctrine of Judicial Supremacy* (1932 ed.); McBain, *op. cit.*, Ch. VII; A. C. McLaughlin, *A Constitutional History of the United States* (1935), Ch. XXIII.

An act of Congress which is alleged to encroach upon the powers reserved to the states or an act of a state legislature which is deemed to be in conflict with a power held by the national government may thus be carried to the federal courts by an interested party on the grounds of unconstitutionality.

As the courts have the obligation of preserving the constitutional balance between the nation and the states, so also they have the function of preserving the balance among the three branches of the national government. In practice this usually means guarding against encroachments by Congress upon the powers of the other two branches.

A third basic function of the federal courts is that of maintaining private rights. It has been shown that the Constitution lays certain prohibitions upon both Congress and the states; that it guarantees civil rights. Suppose Congress should pass a law abrogating the right of trial by jury, a right granted by the Sixth Amendment. Any person denied trial by jury under this law would have the right to test its validity in a federal court, and he would have no difficulty in having it set aside as unconstitutional. A state law impairing the obligation of a contract, thus violating Article I, section 10, of the Constitution, would meet with the same fate in a federal court. More will be said of the guaranty of personal and property rights in the chapter on "Civil Liberties." It is sufficient at this point to emphasize the fact that any person may seek redress in the federal courts whenever Congress or the states, wittingly or unwittingly, violate any of the prohibitions laid upon them by the Constitution.

The power of the judiciary to void legislative acts; its origin. It is already perfectly clear that the judiciary could not perform the important functions named above without the power to void legislative acts. What is the source of this power of "judicial review"? The Constitution does not give the judiciary such authority in express language. It does proclaim, however, that "this Constitution, and all the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." It states also that the judicial power of the federal courts shall extend to all cases arising under the Constitution. But nowhere in the Constitution were the federal courts expressly given the authority to nullify acts of Congress. On the other hand, there is strong evidence that the framers expected the courts to exercise this power. Certainly the Constitution did not state that they should not exercise it, nor did it stipulate that Congress and the state legislatures should be the final judges of their own competence.²⁴ Chief Justice Marshall, applying judicial logic to the provisions of the Constitution, in the celebrated case of

²⁴ *McCain, op. cit.*, pp. 237 ff.

Marbury v. Madison,²⁵ came out with the conclusion that the courts have the power to pass upon the constitutionality of acts of Congress. His decision was logical, but not crushingly logical, and even to this day there are those who are not convinced by his argument nor by the logic of the hundreds who support his opinion with additional arguments. To some Americans, a few of whom are in high places, judicial review is still judicial "usurpation."

MARSHALL'S OPINION. The view of Marshall on the power of the courts to void acts of Congress may be summarized as follows: (1) The Constitution is a superior law. (2) A legislative act contrary to the Constitution is, therefore, not a law. (3) It is always the duty of the court to decide between two conflicting laws. (4) If a legislative act conflicts with the superior law, the Constitution, it is clearly the duty of the court to refuse to apply the legislative act. (5) If the court does not refuse to apply such legislation, the foundation of all written constitutions is destroyed. But the Constitution proclaims that all laws made "in pursuance" of it as well as the Constitution itself shall be the supreme law. Why, then, say those who criticize Marshall, should the courts any more than Congress, the law-making body, determine when a law is made in pursuance of the Constitution? Marshall said that there would be no purpose to the limits on the powers of government if those limits may be passed by those intended to be restrained. But, of course, he may be answered by the statement that the Supreme Court, in voiding an act of Congress, was going beyond those very limits to which the Chief Justice referred. The Constitution limits both Congress and the courts. If the courts may void acts of Congress, they are surely superior organs of government and there is no practical limit upon their powers. These and other flaws are found in Marshall's decision; but the right of judicial review as announced in that decision is accepted by the great majority of Americans today as the practical solution of the problem of keeping the national and state governments in their proper spheres and preserving the "checks and balances" in our somewhat complicated political system.²⁶

The power of the judiciary to void provisions of state constitutions and laws. It is fairly clear from the provisions of the "Law of the Land" clause, quoted above, that the framers of the Constitution were of the opinion that the national as well as the state courts should disregard any part of a state constitution or law which was contrary to the Federal Constitution, laws, or treaties. Furthermore, the twenty-fifth section of the Judiciary Act, passed by the First Congress in 1789, provided that the Supreme Court of the United States might review any case in which a state court had upheld a state law alleged to be in conflict with the Federal Constitution. The Court early intimated that it would exercise the authority to declare

²⁵ 1 Cranch 137 (1803).

²⁶ McBain, *op. cit.*, pp. 240-242.

a state law void, although the first clear case of its use was not until 1810.²⁷ Since then it has been used a great many times.

State courts and judicial review. Judicial tribunals in the states disregard state laws when they are in conflict with the state constitutions; and, as we have seen, they are obligated to declare void provisions of state constitutions and laws which contravene any part of the Federal Constitution or laws. As the fear of a strong central government vanished, conservative state courts were not slow to set aside state laws on the alleged ground that they conflicted with national authority. To prevent state judges from using their judicial power to thus void state laws which might conflict with their personal views on social and economic questions, Congress passed a law, in 1914, providing that such cases might be reviewed by the Supreme Court at Washington at its discretion. At the present time, therefore, it is possible to carry state laws to Washington whether the courts sustain or reject the claim that they conflict with provisions of the Federal Constitution. It is difficult, however, to get a review of a state law which has been held void by a state court as conflicting with the Federal Constitution.²⁸ This is all that need be said about judicial review at present. Further discussion of its operation and of the conflicts that have raged around it may be more appropriately deferred for the chapter on the Federal Judicial System.

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²⁷ Fletcher v. Peck, 6 Cranch 87 (1810).

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Intergovernmental Relations



This chapter is really a continuation of the previous one. One of the major problems considered in that chapter was that of the division of powers between the national government and the states. In this chapter, we shall consider further the place of the states in the Union—their legal position, the restrictions upon them, the obligations of the central government to them, their obligations to each other, and national-state cooperation, particularly through the “federal aid” system. A final section deals briefly with the territories.

The legal position of the states. The Constitution authorizes Congress to admit new states to the Union, and in pursuance of this power Congress has admitted thirty-five states, thus forming a continental empire of free and equal “republics.” Rhode Island has the same right to order her internal affairs as has New York—the same right to be different, a right which she has at times guarded with some jealousy. When North Dakota wants to establish state-owned mills and elevators, she may do so. If a Pennsylvania coal baron has unprintable opinions of Wisconsin’s political and economic system, it is certainly in part because the constitutionally-guaranteed equality of the states permits Wisconsin to go one way and Pennsylvania another. California may sue Nevada and *vice versa*. Several of the original states moved their capitols; therefore, Oklahoma could move hers, although at the time she was admitted to the Union she agreed not to move it.¹

The states are not only legally equal, but they are also legally inviolable and indestructible. The Constitution prohibits the creation of a state within the territory of any other state and the forming of any state “by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.”² In a legal sense the states are as secure as the Union itself. Although one may have a very strong suspicion that General Grant and his armies were not without influence in determining the matter, the Supreme Court of the United States has said that “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.”³

¹ Coyle v. Smith, 221 U. S. 559 (1911).

² Art. IV, sec. 3.

³ Texas v. White, 7 Wall. 700 (1869).

I. CONSTITUTIONAL RESTRICTIONS UPON THE STATES ⁴

The reader should not confuse the restrictions imposed by Congress upon the states at the time of their admission to the Union with the standing restrictions imposed by the Constitution upon all the states. This latter type of restriction, as indicated in the last chapter, may be divided into two classes—those which are political in character and which are for the purpose of giving the national government a free hand in the exercise of some of its very important powers, and those which protect personal and property rights from possible encroachment on the part of the states. The protection of private rights is discussed in Chapter 5. In this section we shall limit ourselves to a discussion of those restrictions which are primarily political in character.

Limitations upon compacts between the states. The Constitution provides that “no state shall enter into any treaty, alliance, or confederation,” and that “no state shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power.” ⁵ The courts of the United States have been very liberal in interpreting the powers of the states under the second clause just quoted. It has been held that there are a number of matters on which the states may make agreements without even asking the assent of Congress. In the case of *Virginia v. Tennessee*,⁶ the Court said: “If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. . . . If the bordering line of two states should cross some malarious and disease-producing district, there would be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in removing the disease.”

For what sort of compacts or agreements between states must the assent of Congress be obtained? In the same case the Court answers this question. “It is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.” If, for example, two states are establishing a boundary, and the line is run in such a way “as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the

⁴ C. K. Burdick, *The Law of the American Constitution* (1922), pp. 242-254 and Ch. XX; J. P. Hall, *Constitutional Law* (1910), Ch. XIV and pp. 344-348.

⁵ Art. I, sec. 10.

⁶ 148 U.S. 503 (1893).

running of such a boundary, or rather for its adoption afterward, the consent of Congress may well be required." But where a boundary, which actually existed before, is simply being marked and defined, the action on the part of the states does not require for its validity the consent of Congress.⁷

While compacts may not play a large part in the solution of interstate problems, they are in rather common use. One of the most conspicuous examples of a thoroughly satisfactory interstate compact is that under which New Jersey and New York established the Port of New York Authority, a compact which was approved by Congress in 1921. More recent compacts have to do with crime prevention, oil and gas conservation, and minimum wages.

Limitations on the commerce power. Very important limitations are placed upon the states with regard to commerce. Not only is the power given to Congress to regulate commerce "with foreign nations, and among the several states, and with the Indian tribes"; but "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws"; nor may a state lay a duty of tonnage without the consent of Congress.

1. **STATES MAY LAY NO IMPORT OR EXPORT DUTIES.** Neither the national government nor the states may place duties on exports. The states, as just noted, are prohibited from laying duties on imports as well. This prohibition means not only that the states must not impose duties on articles at the time of their importation from foreign countries, but also that they may not tax imported articles as long as they have not become a part of the general property of the state. Thus, articles which remain the property of an importer in his warehouse are not subject to state taxation; for such a tax "is too plainly a duty on imports to escape the prohibition in the Constitution."⁸ States may, of course, tax imported articles along with other property in the states after such articles have become commingled with the general property in the states.

Frequently, during the first thirty years of our history, Congress permitted the states to lay small import duties at particular ports for the purpose of improving local ports and quarantine facilities. Also, under the Wilson Act, Congress authorized the states to lay a regulative tax upon imported liquor as long as it was in unsold original packages.⁹

2. **STATES MAY LAY NO TONNAGE DUTY.** A prohibition very closely akin to the one just discussed is that no state shall lay a tax on the carrying capacity of a vessel. When Alabama attempted to tax certain vessels a dollar per ton, the court held that "taxes levied by a state upon ships and

⁷ *Ibid.*

⁸ *Brown v. Maryland*, 12 Wheat. 419 (1827).

⁹ J. P. Hall, *Cases on Constitutional Law* (1926 ed.), p. 1052, note.

vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying any duty of tonnage, without the consent of Congress." But, on the other hand, "taxes levied by a state upon vessels and ships owned by the citizens of the state as property, based on a valuation of the same as property, are not within the prohibition of the Constitution."¹⁰ Suppose a state lays a tax of five dollars for every ship arriving at one of its ports. Is this a duty of tonnage? It was so held in the case of *Steamship Co. v. Port Wardens*: "It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."¹¹

As in the case of imports, in the earlier days of the Republic, Congress permitted the states to levy tonnage duties for the purpose of improving harbor facilities. Now that the national government has taken rather complete charge of such improvements, the states have little reason to ask for the privilege of laying a tonnage tax.

3. STATE POWER IS LIMITED IN RESPECT TO INTERSTATE COMMERCE. The Constitution gives Congress the power to regulate interstate commerce. The grant of this power to Congress does not exclude the states from passing considerable legislation on the subject, but it does limit the authority of the states in two significant ways. First, when Congress acts to regulate particular types of transaction in interstate commerce or an interstate carrier, the railroads, for example, all state law inconsistent with the national regulations must give way. Second, even in the absence of any congressional legislation, state laws are regularly declared void if they relate to interstate transportation or trade which admits of only one uniform (and therefore national) system of regulation. Then what power over interstate commerce is left to the states? The answer is, a great deal. Long ago the courts held that the states, exercising their police powers, could make regulations in the interest of local health and safety, even though such regulations might incidentally interfere with interstate commerce. Thus, when an epidemic of anthrax was raging among Louisiana live stock, the State of Texas prohibited the transportation of such stock from Louisiana into Texas, and the Supreme Court of the United States sustained this act.¹² Similarly, the Court has upheld the right of a state to require locomotive engineers to be examined and licensed; to regulate the heating of passenger cars; to require guard posts on bridges; and to limit the speed of trains at grade crossings.¹³ The proudest of the many interstate "flyers," "cannon balls," and "zephyrs" may be validly required by city ordinance to slow down within the corporate limits and to refrain

¹⁰ *State Tonnage Tax Cases*, 12 Wall. 204 (1871).

¹¹ 6 Wall. 34 (1867).

¹² *Smith v. St. L. & S.W.R.R. Co.*, 181 U.S., 248 (1901).

¹³ *Southern Ry. Co. v. King*, 217 U.S. 524 (1910).

from making unnecessary noises. Many other state and local regulations promulgated in the interest of the health, safety, and convenience of the public have been sustained. Indeed, the delegation of the interstate commerce power to Congress, as that power has been interpreted by the courts, has not prevented the states from impeding and obstructing the flow of trade between the states.

Interstate trade barriers. Moved by the understandable and commendable desire to improve the economic lot of their citizens, and urged by special interest groups, state legislatures have used their police and taxing powers to prohibit or restrict the sale in local markets of out-of-state products. Quarantine laws as a protection from insects and plant diseases which might be carried in the products of other states are desirable, and all of the states have them on their statute books. But those who have made careful studies of this legislation have a decided inclination to share the opinion of irate haulers of produce that it is more often intended for the purpose of barring perfectly good produce from other states than for keeping out insect pests and plant diseases. States have quarantined the fruits of other states for diseases which have not existed in those states for years. Such quarantines are for the purpose of protecting local fruit growers and forcing local consumers to eat state-grown fruits or go without. States have the right to regulate highways in the interest of safety and to require payment for their use. This right is also abused. The height, width, load per tire, and overall gross weight of trucks permitted by law vary greatly among the states, and it seems fairly clear that some states lay down these and other specifications for commercial trucks with an eye to keeping out trucks from other states. Taxes, or the charges for the use of the highways, are sometimes so levied as to discriminate against out-of-state commercial vehicles.

Food grading laws for the protection of the consumer against unscrupulous and careless dealers are necessary and desirable. But it is found that many states have used such laws to discriminate against the food which might be brought in from other states. A law or ordinance which on its face is designed for the entirely proper purpose of insuring pure milk to the consumer may be and often is primarily for the benefit of local dairy-men, and a law which is supposed to guarantee to the consumer fresh eggs may do no more than require that out-of-state eggs be branded "shipped eggs," while local hens may be permitted to cackle over labels suggesting the super-freshness of their output. A number of dairy states have taxed margarine, a perfectly good article of diet, so heavily that it cannot compete with butter. Some Southern states are even more discriminating in their discrimination. They tax only margarine which is not made exclusively from cottonseed oil and other home-produced oils and fats.

These and many other trade barrier laws are directly in conflict with the policy of a free exchange of goods among the states which our forefathers

thought they had written into the Constitution, the policy which goes far to explain the national prosperity enjoyed during the greater part of our history. The new war between the states, this economic war born of the depression is even less sensible as a solution of our present economic ills than was the Civil War a sane solution of the problems of 1860. Trade barriers help only a few groups in particular states. The consumers are not benefited, the states are not benefited, and even the state producers who are supposed to be favored may not profit in the long run. Certainly most producers want to sell outside their own state. But the restrictions the home state puts on the transportation and marketing of out-of-state goods meet with speedy retaliation from other states, so that trade is interrupted and even brought to a standstill in certain commodities. If one wants to sell one must buy. It is as simple as that. Buy American, buy New Mexican, buy Oshkosh do not, "begosh," make sense as an economic argument. The last step in this argument is—do not buy at all; if you want something make it or grow it yourself. Trade is an exchange of goods, and it is promoted by laws which encourage that exchange, not by laws which restrict it.

The federal courts seem to be without power to prevent the erection of these trade barriers because in erecting them the states have used powers which they undoubtedly possess, the police and taxing powers. Furthermore, the Twenty-first Amendment expressly permits the states to pass restrictive legislation concerning interstate trade in intoxicating liquors. Of course this provision was inserted in the amendment to enable the "dry" states to protect themselves from floods of liquor from other states, but it has been used primarily as a means of forcing individuals who drink wine and beer to purchase wines and beers made locally from home-grown products.

Yet something is being done about these trade barriers. The Council of State Governments and other commissions on state co-operation have attacked them with intelligence and energy. Various departments of the federal government, many editors, and some enlightened state officials and legislators have become interested. Since 1939 the state legislatures have shown a commendable and encouraging tendency to resist proposals which would increase trade restrictions among the states. There have been some instances of the repeal of restrictive measures, and the exigencies of war may cause the national government to break down many of these barriers without much ceremony.¹⁴

¹⁴ There is much current literature on the subject. A few titles are as follows: F. E. Melder, *State and Local Barriers to Interstate Commerce in the United States* (1937); Melder, "State Trade Walls," *Public Affairs Pamphlet* No. 37, 1939; Melder, "Trade Barriers Between States," *Annals of the American Academy of Political and Social Science*, January, 1940, pp. 54-61; R. L. Buell, "Death by Tariff," *Fortune*, August, 1938; J. T. Flynn, "Shove Thy Neighbor," *Collier's*, April 30, 1938; *Trade Barriers Among the States*, published by the Council of State Governments, 1939; R. C. Hendrickson, "Trade Barriers

Limitations on state monetary and taxing powers: 1. **STATE BANKS AND BANK NOTES.** No state shall coin money, emit bills of credit, or make anything but gold and silver coin a legal tender in payment of debts. This provision of the Constitution owes its origin to the unfortunate paper money experiments of the states during and immediately following the Revolution. The commercial classes were fully persuaded that the national government alone should have monetary powers. We must note that the restrictive clause does not prohibit the states from chartering banks which compete with the national banks; nor does it prevent states from authorizing their banks to issue bills which may circulate as currency, although not as legal tender. State bank notes are kept out of circulation, however, by a statute of Congress which imposes a heavy tax upon their issue.

2. **BILLS OF CREDIT.** The courts have been liberal with the states in interpreting the prohibition with regard to bills of credit. In only one case have state obligations been held void as bills of credit. This occurred when Missouri, more than a hundred years ago, made loans to her citizens in the form of certificates which were to be accepted as money for taxes and for salaries and fees of state officers.¹⁵ The more liberal view is illustrated by the following: Texas issued state warrants to pay its debts. They were made receivable for all taxes and public dues, and the law authorized state officers to pay public creditors with them if such creditors would receive them. When this paper was received back by the state it was not to be reissued. Since it was not to circulate as money in ordinary business transactions, the Court held that the issue did not constitute bills of credit.¹⁶

3. **INTERGOVERNMENTAL TAXATION.** In the discussion on national supremacy, reference was made to Chief Justice Marshall's opinion in which he laid down the rule that the states could not tax the operations of the national banks.¹⁷ Following the principle enunciated by Marshall, it has been held that the states may not tax the property of the national government, its bonds, its franchises, the salaries of its officers, or otherwise by taxation obstruct the operations of the national government. It should be noted, however, that Congress may authorize the states to levy certain taxes which might otherwise fall within the list of prohibitions. For example, the states are permitted to tax the real property of national banks as they tax other real property, and they may tax the stockholders. When the national government attempted to tax the states and their instrumentalities, the Supreme Court applied the same rule of implied prohibi-

and National Unity," *State Government*, April, 1941; O. K. Armstrong, "Barriers Between the States Must Go," *Reader's Digest*, April, 1942 (condensed from *The Rotarian* of the same month).

¹⁵ *Craig v. Missouri*, 4 Pet. 410 (1830).

¹⁶ *Huston, etc., Ry. Co. v. Texas*, 177 U.S. 66 (1900).

¹⁷ *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

tion, holding that the central authority had no more right to interfere with the functioning of the state governments than those governments had to interfere with the processes of the central government.

Recent developments. Formerly the Supreme Court made much of Marshall's extreme statement in *McCulloch v. Maryland*—"the power to tax involves the power to destroy"—and was quick to declare invalid any act of a state legislature which imposed a tax upon national agencies or officers on the theory that such a tax was the entering wedge which would "destroy" the national government. Recently the Court has been less under the influence of Marshall's absolutes and it has been more under the guidance of the legal wisdom of the late Justice Holmes who recognized few absolutes, maintaining that "distinctions of the law are distinctions of degree" and that "the power to tax is not the power to destroy as long as this Court sits."¹⁸ Approaching the problem of intergovernmental taxation, with the distinctions of degree in mind, the Court now takes the view that a state tax, non-discriminatory in character, which falls upon an agency or officer of the national government is valid if it is not an economic burden which is passed on to that government. It no longer holds that taxing the salary of a government official has the same result as a tax on the government itself. In *Graves v. New York*¹⁹ the Court held that the New York State income tax law was valid when applied to the salary of an examining attorney for the Federal Home Owners' Loan Corporation. This tax, said the Court, "is laid upon income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly." The year before, in *Helvering v. Gerhardt*,²⁰ the Court had overruled a number of earlier decisions and held that the national government could tax the salaries of state officers. In the Public Salary Act of 1939 Congress brought the salaries of state officers and employees within the Federal taxing area, and authorized the states to impose non-discriminatory taxes upon the salaries of officers and employees of the United States. The demise of the old practice of intergovernmental salary tax exemption finds few mourners. It was of no clear benefit to any government and it gave those receiving salaries for government services a privileged position.

It is by no means improbable that intergovernmental taxation of the income from bonds will soon be a fact. The President has recommended that the federal government tax state and local securities, but Congress has not acted as yet. Since the Supreme Court has held that taxing the income from a bond is not the same thing as taxing the bond itself,²¹ it is

¹⁸ Dissenting in *Panhandle Oil Co. v. Mississippi*, 277 U.S. at 223 (1928).

¹⁹ 306 U.S. 466 (1939).

²⁰ 304 U.S. 405 (1938).

²¹ *Hale v. State Board*, 302 U.S. 95 (1937).

not unreasonable to assume that Congress might validly levy a tax on the income from state bonds. It is of course clear that Congress may tax the income from federal bonds, and may authorize the states to tax those incomes. It is estimated that the abolition of such tax exemptions would yield revenues to the governments several times larger than the additional interest they would have to pay on their taxable securities. Furthermore, it is noted that a discontinuance of the practice of exemption would be eminently fair, since under the exemption plan our system of progressive taxation operates much more to the advantage of those with the large incomes than to those with small incomes.²²

The national government taxes state activities which are of a non-governmental, or, to use the term generally employed, proprietary character. The distinction between governmental and proprietary functions is not easy to draw. It is a judicial question. The courts have held that functions performed by such public agencies as the courts, the police, the schools, the hospitals, and the water departments are governmental in character. Such state and local functions the national government may not tax. The state liquor business, street railway systems, public wharfs, state owned banks, football spectacles in state educational institutions, and a number of other state enterprises are declared to be proprietary activities. These the national government may tax.²³ On the other hand, the distinction is not made between governmental and proprietary activities of the national government. Because that government has no powers except those which are delegated to it by the Constitution, the Supreme Court holds that "its every action within its constitutional power is governmental action."²⁴ Consequently, a state may not, without the consent of Congress, tax a function of the national government even though Congress may tax state governments performing the same function. But the Court has held that states may tax the boats of a dredging company engaged in the pursuance of a contract with the United States, the income which an individual receives from a contract with the United States, railroads holding federal charters, and holders of federal copyrights and patents, to give only a partial list. These and similar taxes the states are permitted to impose because the burden of such taxation does not fall upon the United States.²⁵

²² David Fellman, "Intergovernmental Taxation Today," *Annals of the American Academy of Political and Social Science*, January, 1940, pp. 36-37; Alfred G. Buehler, "Discrimination in Federal Taxation of State and Local Government Securities," *Am. Pol. Sci. Rev.*, April, 1942, 302-312.

²³ Fellman, *op. cit.*, pp. 27-28.

²⁴ *Graves v. New York*, 306 U.S. 466 (1939); see also *Pitman v. Hole*, 308 U.S. 21 (1939).

²⁵ Fellman, *op. cit.*, pp. 34-35.

II. OBLIGATIONS OF THE NATIONAL GOVERNMENT
TO THE STATES ²⁶

The national government is under some specific obligations to the states. Article IV, section 4, of the Constitution reads: "The United States shall guarantee to every state . . . a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

The guaranty of the republican form of government. The Constitution nowhere defines what is meant by the republican form of government. Undoubtedly, the framers were sure that the state governments as they were constituted in 1787 were republican. It is also certain that Congress, by her acceptance of the constitutions of the new states, recognized them as having the essential features of republicanism. Republican government is thus understood to be a government in which a substantial body of the people have the right to choose their representatives and, in American practice, the right directly or indirectly to choose their executive.²⁷

WHO APPLIES THE TEST FOR REPUBLICANISM? As the Constitution fails to define republican government, so it fails to specify what branch of the national government shall apply the republican test to a state's political institutions. Applying the test is rather obviously a political matter and, therefore, a power which naturally belongs to the political arms of the government—Congress and the President. Congress, through its power to admit new states and by its authority to exclude representatives from its membership, is in the best position to determine whether a state is republican and to enforce its ideas as to what constitutes that type of government. The courts have taken this view, at least; and they accept as republican any and all state governments which are expressly or tacitly recognized as such by Congress, or by the President acting under the authority of Congress and the Constitution.

Examples of the application of the test. Rhode Island, continuing under her old colonial charter, had a very restricted suffrage, of which the more democratic element in the state complained incessantly, insisting upon a constitutional amendment to broaden the franchise. Invariably blocked by the legal voters of the state, who constituted a relatively small group of the population, the reformers took matters into their own hands and in 1841, under the leadership of Thomas Dorr, established a competing "state government" along more democratic lines. Upon an appeal of the regular authorities of the state, President Tyler took steps to put down

²⁶ J. M. Mathews, *The American Constitutional System* (1940 ed.), pp. 57-63; W. W. Willoughby, *Principles of the Constitutional Law of the United States* (1930 ed.), Ch. XI.

²⁷ Willoughby, *op. cit.*, pp. 139-140.

Dorr's rebellion, and his irregular government then collapsed. In the course of time, the question as to which government of Rhode Island was republican in form came before the Supreme Court. The Court held that it was bound to accept the acts of the political departments of the national government as conclusive on that question, and that the President's action in assisting the regular authorities in the state was a recognition of their government as the republican government.²⁸

A very interesting case arose over whether Oregon's initiative and referendum laws violated the principles of republican government. Some alleged that republican government was *representative* government, and that laws enacted directly by popular vote were therefore in violation of the republican guaranty of the Constitution. The Court held again that the question was political in character, and dismissed the case for want of jurisdiction. The Court indicated, however, that Congress, in admitting representatives from the state, tacitly affirmed that the initiative and referendum did not contravene republican principles.²⁹

States protected from invasion and domestic violence. Closely connected with the guaranty of the republican form of government in the states is the guaranty that the national government shall protect the states against invasion and domestic violence. There is no difficulty in interpreting the meaning of this obligation with regard to invasion; for an invasion of a state by a foreign army would be at the same time an invasion of the United States, and there is no question of the right and duty of the national government to resist such an attack. But when the internal order of a state is disturbed by rebellion or riot, the obligation of the central government is not so clear. The Constitution says that aid shall be extended to the states when the state authorities request it. This was done in the Rhode Island case noted above. If, however, the President feels that the state is capable of maintaining order and that it makes a request for national intervention because of timidity or for political reasons, he may refuse to send aid. For some such reasons, President Harding at first hesitated to accede to the request of West Virginia for federal support in reducing disorders incident to the coal strike in that state. On the other hand, when domestic disturbances in a state reach such proportions that the national property is in danger or the national services are interrupted, the President may send federal troops to the scene of the disorder, even against the protest of state authorities, as President Cleveland did in 1894 on the occasion of the great railway strike in the Chicago vicinity.

²⁸ *Luther v. Borden*, 7 Howard 1 (1849).

²⁹ *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

III. INTERSTATE RELATIONS ³⁰

The states, when acting within their spheres of government, are, in a legal sense, foreign to one another except where the Constitution of the United States specifies to the contrary. It is true that foreign countries co-operate to a considerable extent under the rules of international law, but, in four important particulars, the Constitution establishes a much closer relationship among the states than is to be found between foreign states. These relate to public acts, privileges of citizens, extradition, and the settlement of controversies.

Full faith and credit clause. In the first place, "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."³¹ In colonial times, one colony treated the judgments of the courts of another as foreign judgments, allowing them to be re-examined on their merits and to be impeached for fraud or prejudice. This sort of procedure operated as a considerable handicap upon intercolonial relations; and the men who drew up the Articles of Confederation, as well as those who drafted the Constitution, inserted the provision quoted above in order to establish more satisfactory legal relationships among the new states.

ITS MEANING. The "full faith and credit" clause does not require the courts of one state to enforce the penal laws of another. It applies only to civil matters. Records of deeds, wills, contracts, legislative acts, and judicial proceedings, when properly authenticated, must be given the same force in every other state that they have in the state in which they were made. For example, a will is made in Oregon. It may happen, through change in residence of the testator, that the will is probated in South Carolina. Now the laws of South Carolina with respect to wills probably differ from the laws of Oregon. That does not matter. The courts of South Carolina must accept the will—give it "full faith and credit"—made in accordance with Oregon law. A more significant example is that of a judicial proceeding. A local merchant sells a fellow townsman an automobile. Failing to receive his payments, the dealer sues the buyer in a local court and recovers judgment against him. Before the judgment is satisfied, the buyer goes to another state, taking his property with him. It is not necessary for the merchant to bring suit against him again. All he has to do is to show the courts in the state to which the buyer has moved that he has an unsatisfied judgment against the buyer in the original state. If the court of the original state had jurisdiction and if the records sent from it are authentic, the court in the second state will order the judgment against the buyer carried out. In no case may the

³⁰ Burdick, *op. cit.*, Chs. XXIII-XXV; W. F. Dodd, *Cases on Constitutional Law* (1941), 367-389; Mathews, *op. cit.*, Ch. VI; Willoughby, *op. cit.*, Chs. XIII-XV.

³¹ Art. IV, sec. 1.

courts of the second state re-examine the original judgment on its merits, or on the ground of fraud in obtaining it. Even if the laws of the two states differ on the subject of the litigation, the second state must, nevertheless, enforce the judgment obtained in the first.³²

FULL FAITH AND CREDIT AND DIVORCE. It is notorious that the validity of divorces granted by some states has been questioned in other states. In view of the "full faith and credit" requirement, how may states refuse to recognize divorces decreed by sister commonwealths? Until recently a state could refuse to honor the divorce granted by another if the second state did not have jurisdiction over both the parties or if the defendant in the case did not have proper notice. The public was not infrequently treated with a comic, sometimes tragic, spectacle of persons who were divorced in one state and still married in another. In 1940 the Nevada divorce mill granted decrees to a man and a woman from North Carolina who had stopped for six weeks in a Nevada auto camp to qualify for domicile. The couple were then married in Nevada. Returning to North Carolina, where the former spouse of each resided, they were convicted of bigamous cohabitation and sentenced to jail. In 1942 the Supreme Court of the United States set aside their conviction and held that a decree of divorce, granted by a state to one who is *bona fide* domiciled therein, is binding upon the courts of other states, including the state in which the marriage was performed and where the other party to the marriage was still domiciled when the divorce was decreed.³³ This decision overruled one of thirty-seven years standing and seems to have gone a long way toward compelling strait-laced states to accept the divorce decrees of more tolerant ones. In other words, such decrees no less than other judgments must now be given "full faith and credit."

The privileges and immunities clause. The second particular in which the Constitution brings about a much closer relationship among the several states than is found among foreign states, is expressed in the provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."³⁴ The importance of preventing unjust and arbitrary discriminations by the states to the advantage of their own citizens and against citizens of other states was recognized from the first; for the Articles of Confederation contained a provision similar to that just quoted.

ITS MEANING. The object of the clause is to place the "citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the

³² Mathews, *op. cit.*, pp. 70-72.

³³ Williams v. North Carolina, 317 U.S. 287.

³⁴ Art. IV, sec. 2.

right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."³⁵ The provision does not mean, of course, that a citizen of Washington who goes to Oregon carries the laws of Washington along with him; but that when he is in Oregon he must be treated by that State as it treats its own citizens,³⁶ and we shall presently find that even this is subject to certain modifications.

ILLUSTRATIONS: 1. Invalid discriminations. Maryland passed a law requiring persons not permanent residents of the state to take out licenses for the sale of goods. In declaring the law invalid the Court said: "The defendants might lawfully sell . . . any goods which the permanent residents of the state might sell . . . without being subjected to any higher tax or excise than exacted by law of such permanent residents."³⁷ Not only may a state not require a special license tax for the sale of goods by nonresidents, but such nonresidents may not be taxed on their general property in the state except as permanent residents of the state are taxed. Again, if a state permits its citizens to act as trustees of property within the state, it must extend the same privilege to nonresidents. In like manner, statutes which confine to residents the right to take property by will are invalid.³⁸

2. Valid discriminations. Various types of discrimination are, however, permitted. Said the Court in *Blake v. McClung*: "There are privileges that may be accorded by a state to its own people, in which citizens of other states may not participate, except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. . . . So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state, who becomes a resident thereof, shall exercise the right of suffrage or become eligible for office."³⁹

Concerning common property. It has never been held that a state must allow the citizens of other states to share the common property of its

³⁵ *Paul v. Virginia*, 8 Wall. 168 (1869).

³⁶ Neither aliens nor corporations reap any advantage from the clause under discussion, for neither are citizens.

³⁷ *Ward v. Maryland*, 12 Wall. 418 (1871).

³⁸ J. P. Hall, *Cases on Constitutional Law* (1926 ed.), pp. 204, 205, notes.

³⁹ 172 U.S. 239 (1898).

citizens. More than a century ago, New Jersey passed a law forbidding any person not a resident of the state from gathering oysters therein. This was upheld on the ground that the state was exercising ordinary property rights.⁴⁰ The same rule is applied with regard to wild game, fish, and common grazing land. By the same principle, students who are not permanent residents of a state are usually charged higher fees in public institutions of learning, such institutions being the common property of the people of the state. It might be argued also that a state could charge nonresidents more for the use of property connected with its courts and police protection; but these are such essential functions of government that discriminating rates in respect to them would doubtless be held to violate the privileges and immunities clause.⁴¹

Concerning professions and occupations. A citizen of one state may not claim an unrestricted right to practice his profession or engage in his occupation in another state, if it can be shown that residence in the state or residence for a certain period better qualifies him for following such profession or occupation in the state. Lawyers, being officers of the courts, in a technical sense at least, are reasonably required to be residents of the state.⁴² A Nevada statute restricted the practice of medicine in the state to regular graduates in medicine and to those who had practiced in the state for ten years next preceding the enactment of the statute. It was contended by counsel for a Dr. Spinney, who had violated this statute, that ten years of practice in any other state was just as good experience as practice for that length of time in Nevada, and that the statute was, therefore, unreasonable. The court sustained the statute on the ground that different types of diseases and vocations in the several states rendered experience gained in medical practice in other states less valuable than experience gained in Nevada.⁴³ Statutes imposing somewhat similar restrictions upon the practice of dentistry and requiring bankers to be residents of the state have been upheld. States commonly require the proprietors of saloons to be residents.⁴⁴ These and similar regulations respecting various callings which have to do with the safety, health, and vital interests of citizens are permitted because the states would be under great difficulties in controlling nonresidents or in learning essential facts about newcomers seeking to engage in those callings.

In final analysis, then, the privileges and immunities guaranties of the Constitution "forbid only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly apper-

⁴⁰ *Corfield v. Coryell*, 4 Wash. C.C. 371 (1825).

⁴¹ J. P. Hall, *Constitutional Law* (1910), p. 339.

⁴² *Ibid.*, p. 341.

⁴³ *Ex parte Spinney*, 10 Nev. 323 (1875).

⁴⁴ J. P. Hall, *Cases on Constitutional Law* (1926 ed.), p. 212, note.

tain to those who are part of the political community known as the people of the United States.”⁴⁵

Interstate rendition. A third particular in which the states are brought a little closer together than are foreign states is in the matter of handling fugitives from justice. The nations commonly regulate the extradition of fugitives by treaty agreement. Our Constitution provides that, “a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.”⁴⁶ Thus the international practice of extradition is made constitutional law in the American states. As between our states, it is commonly referred to as “interstate rendition.”

THE RENDITION PROCESS. The process of rendition is regulated by an act of Congress which is supplemented by local statutes in most states. It operates about as follows: The crime of robbery is committed in Maryland and the person alleged to have committed the crime flees to New York. His whereabouts having become known to Maryland authorities, the Governor of Maryland notifies the Governor of New York, who causes the arrest of the alleged fugitive. The Governor of Maryland must present to the chief executive of New York a certified copy of the indictment or affidavit charging the person demanded with having committed the crime of robbery in Maryland. If the Governor of New York (assisted, of course, by his legal advisers) is satisfied with the regularity of these papers, and if it appears that the individual demanded is actually a fugitive from Maryland justice, he will have him surrendered to an officer of the State of Maryland, to be carried back to that state for trial.⁴⁷

RENDITION NOT COMPULSORY. Ordinarily the requisitions are honored and the process of rendition works smoothly, but in no case may a governor be compelled to comply with a demand for an alleged fugitive. Speaking of the rendition clause of the Constitution and of the act of Congress relating to it, Chief Justice Taney said: “Looking to the subject-matter of this law, and the relations which the United States and the several states bear to each other, the Court is of opinion the words ‘it shall be the duty’ were not used as mandatory and compulsory, but as declaratory of the moral duty which this command created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is

⁴⁵ *Blake v. McClung*, 172 U.S. 239 (1898).

⁴⁶ Art. IV, sec. 2, cl. 2.

⁴⁷ *Roberts v. Reilly*, 116 U.S. 80 (1885). Once back in Maryland, the accused may be tried for crime other than that specified in the request for his rendition. Furthermore, he has no redress, even if he has been kidnapped and returned without lawful authority. (Willoughby, *op. cit.*, p. 173).

there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights." ⁴⁸

CASES OF NONCOMPLIANCE: 1. *Unreasonable delay in making the requisition.* There are several types of cases in which, on more or less justifiable grounds, a governor has refused to comply with a requisition from the governor of another state. A Mr. Wurtsbaugh, for many years a resident of Iowa, was wanted in Kentucky, where he was alleged to have committed the crime of bigamy eighteen years before. The Attorney General of Iowa, in advising the Governor not to comply with the requisition of the Governor of Kentucky, said: "It is repugnant to every sense of justice to say that where a person leaves a state in the ordinary course of affairs without any attempt of concealment, and for eighteen years lives an upright life, he may be arrested and returned to the state where the crime is claimed to have been committed eighteen years before, to be put on trial for that offense, unless he is charged with murder ⁴⁹ or treason. . . . If the authorities of Kentucky desired to try Mr. Wurtsbaugh for the offense of bigamy, an application for his return to that State should have been made with reasonable promptness after the offense was committed. Under all the circumstances of this case, I am of the opinion that Wurtsbaugh cannot now be held to be a fugitive from justice under the provisions of the Federal Constitution." ⁵⁰

2. *Fear that fair trial will not be granted.* Governors have also refused to honor requisitions from chief executives of other states in cases in which it was felt that the fugitives would not be given a fair trial if delivered up. For this reason, in 1918, Governor McCall of Massachusetts failed to comply with the request of the West Virginia authorities for a Negro alleged to have committed a crime in the latter state. This was, of course, a great affront to West Virginia; but, as we have learned, a decision like Governor McCall's is final.

West Virginians may have found some comfort in the letter of Governor (Mrs.) Ferguson of Texas to Governor Fuller of Massachusetts, in which she refused to deliver up A. P. Russell, wanted in Massachusetts for wife desertion. "I have many precedents, either right or wrong," she wrote, "but the most vivid to my memory of them all is the action of a Governor of Massachusetts a short time ago in refusing to honor the requisition of Governor John J. Cornwell of West Virginia for the interstate rendition

⁴⁸ *Kentucky v. Dennison*, 24 How. 66 (1860).

⁴⁹ Governor Cullom of Illinois once refused to honor a requisition for two men wanted in Pennsylvania for murder. His chief reason for refusal was that they had lived in Illinois for fourteen years as respectable citizens. R. L. Mott, *Materials Illustrative of American Government* (1925), p. 48.

⁵⁰ C. A. Beard, *Readings in American Government and Politics* (1913), p. 149.

of a Negro charged with a felony in West Virginia, who sought a haven of safety in your state and found it." ⁵¹

3. *Political reasons.* In international practice, extradition is commonly refused where an alleged fugitive is wanted for a political offense, such as participating in a rebellion. It would seem that the American states may apply the same principle in connection with crimes associated with politics. When former Governor Taylor of Kentucky was indicted in that state for participation in the murder of Governor Goebel, he took refuge in Indiana and the chief executive of that state would not deliver him to the Kentucky authorities.

Controversies between states. The fourth constitutional provision that brings the states into a closer degree of relationship than is enjoyed by foreign powers is that clause which calls for judicial settlement of interstate controversies. Sovereign states such as the United States and Great Britain may not sue each other unless both parties consent. Where they are unwilling to submit their differences to an international court, they may exhaust the arts of diplomacy and risk the force of arms in reaching a settlement. The states of the United States are forbidden to make war. They must settle all of their disputes by agreement or judicial means. While many interstate disputes are settled by agreements between the states, the great majority of the more serious differences are brought to a solution through the operation of that incalculably valuable provision of the Constitution which extends the judicial power of the United States to controversies between the states.

Illustrations. In a number of cases, the Supreme Court of the United States has been called upon to settle boundary disputes between the states. Many cases of other types have been similarly adjudicated. Missouri sued Illinois when the Sanitary District of Chicago, acting under state authority, constructed a drainage canal which carried sewage to the Mississippi, thus polluting the water supply for inhabitants of Missouri.⁵² Some years ago, Colorado took so much water from the Arkansas River for irrigation purposes that Kansas felt deprived of her share, and the Supreme Court upheld the right of Kansas to sue Colorado.⁵³ When West Virginia came into the Union, she agreed to pay a fair part of the debt of Virginia as it stood January 1, 1861. It was necessary for Virginia to institute a number of suits in the courts of the United States before West Virginia would make a settlement. This long-standing controversy over some \$12,000,000 illustrates not only the importance of cases settled by judicial means, but also the rare tact and good judgment exercised by the Court in deciding such cases.⁵⁴ A recent case which aroused considerable interest

⁵¹ J. M. Mathews and C. A. Berdahl, *Documents and Readings in American Government* (1940 ed.), p. 102.

⁵² 180 U.S. 208 (1901) and 200 U.S. 496 (1906).

⁵³ 185 U.S. 125 (1902) and 206 U.S. 46 (1907).

⁵⁴ 246 U.S. 565 (1918).

was Arizona's unsuccessful attempt to secure a Court injunction to prevent California, certain other states, and the Secretary of the Interior from carrying out the Boulder Dam project.⁵⁵

IV. FEDERAL AID TO THE STATES ⁵⁶

The topic now to be briefly discussed differs materially from the preceding ones. They were primarily legal and political in character. The present one, federal aid, has its legal and political aspects, to be sure; but its economic and social bearings are of much greater significance. Here we find the nation and the states co-operating in various governmental functions, and we find the lines which divide national and state activities a trifle dim in some cases. Federal aid to the states is not a new adventure in our system of government; but in recent decades it has increased both in amount and kind. The states are now required to "match the federal dollar," and, at the same time, federal control over the functions for which the money is appropriated has increased. It presents an interesting problem in intergovernmental relationships.

Aid without strings attached. Earlier federal aid to the states was usually in the form of land grants, which were received subject only to the understanding that they were to be used for specified purposes. This system had its origin in 1785, when the old Congress of the Confederation decreed that certain lands of the Northwest Territory should be set aside for public schools. When Ohio was admitted to the Union in 1802, Congress granted one section of land in each township for schools, a practice which was continued for states admitted thereafter. From 1848 to 1894, two sections were granted; after 1894, four sections. Higher education also received assistance, the common practice until 1889 being to grant to each newly admitted state at least two townships for a university. States were also given lands for their seats of government, for building canals, for the stimulation of railroad construction, and for other purposes.

But these early grants contained no stipulations as to the minimum price the states should receive for the lands, nor were directions given for the administration of the funds thus acquired. The result was that the state authorities did as they pleased; and what most of them pleased to do causes us to deplore the lack of foresight, to put it mildly, of the rugged individuals who sat in high places a few generations ago. Often the land was sold at rates so low that the suspicion of corruption was persistent. The best that can be said is that it was parted with light-heartedly and with the unjustified optimism that there would always be more. About

⁵⁵ 283 U.S. 423 (1931).

⁵⁶ Joseph P. Harris, "The Future of Federal Grants-in-Aid," *Annals of the Am. Acad. of Pol. and Soc. Sci.*, Jan., 1940, pp. 14-26; V. O. Key, Jr., *The Administration of Federal Grants to the States* (1937); A. F. Macdonald, *Federal Aid* (1928), and "Federal Aid to the States: 1940 Model," *Am. Pol. Sci. Rev.*, June, 1940, pp. 489-499.

seventy years ago, when much of the loss had already occurred, Congress fixed a minimum price at which land grants might be sold, and from time to time has added more restrictions respecting sale and the administration of funds received.

Aid with supervision: As just noted, supervision of the type of grant mentioned above came too late to conserve the grant in most states. A new policy of "locking the stable before the horse was stolen" had its inception with the far-reaching Morrill Act of 1862, by which each state received 30,000 acres of land for each of its senators and representatives in Congress—such lands to be used for the establishment of colleges in which agriculture, mechanic arts, and other subjects should be taught. Safeguards in the use of the lands were few and ineffective as measured by present standards of federal regulation of subsidies to the states, but a beginning was made. While failing to fix a minimum price at which land might be sold, Congress did establish requirements respecting the investing of the money obtained from sales and stipulated that the principal should not be expended. Another important provision prohibited the use of any of the money for college buildings, building construction being fixed as the obligation of the states. Here we see the beginning of the principle that a state, in order to receive federal aid, must itself assume a financial obligation.

The Second Morrill Act (1890) provided cash appropriations for the land-grant colleges. Appropriations under this and a recent act now amount to about \$100,000 annually for each state. Expenditure of any of this money for buildings is prohibited as in the original act. But the most important feature of the act of 1890 is that the Secretary of the Interior may withhold the allotment from any state which does not fulfill its obligations under the act. At this point we see the introduction of the now very familiar and very powerful means of federal supervision. It was easy for the states to forget their right of freedom from federal interference in their local affairs and accept the supervision, when the kindly central government approached them "with its hand in its pocket." Three years prior to the passage of the Second Morrill Act, Congress provided in the Hatch Act for cash contributions to the states and territories, the funds to be used for agricultural experiment stations. Under this act and later supplementary acts, particularly the Purnell Act of 1925, each state and territory now receives an annual appropriation averaging approximately \$135,000 for experiment stations established in connection with the agricultural colleges. Although no adequate means of federal supervision of the expenditure of funds was provided for in the original grant, federal authority in this direction was considerably strengthened by an act of 1906.

Aid on the fifty-fifty basis plus federal supervision. The Weeks Act of 1911 marks the beginning of a third system of federal aid. In making

funds available for the use of the states in the protection of forested watersheds of navigable streams, Congress provided not only that no state should have funds until it had established a system of fire protection approved by the Secretary of Agriculture, but also that *no federal aid would be forthcoming unless the state matched the federal appropriation*. These principles, with some relaxation in the "match the federal dollar" requirement, have guided the grants to the states. Just how much of the total federal appropriation for fire protection any state might have was to be determined by its needs as the Secretary of Agriculture might see them. A later act (1924) authorized a federal subsidy for fire protection on forest lands whether watersheds of navigable streams or not, thus abandoning any pretense of making such grants under the commerce power. All the funds are expended under the direction of state officials; but federal inspectors audit accounts, give encouragement and advice, and issue such warnings as may be necessary to keep the state standards at a satisfactory minimum. The Federal Highway Act of 1916 has led to very large annual expenditures for roads. The states must match the federal dollar, and they must construct roads according to standards approved by federal authority in order to receive their allotments. The money is apportioned among the states according to population, area, and road mileage, each being weighted one third. The amount of this subsidy now averages more than \$100,000,000 a year. On the same general basis of one-half cost and federal supervision, the states now receive about \$65,000,000 per annum for national guard units (less since the guard has been mustered into national service); \$20,000,000 for vocational education and much larger special grants for vocational training for defense workers; and some \$18,000,000 for agricultural extension work.

During the last decade, federal aid to the states has increased both in the amounts appropriated for specific purposes and in the number of purposes for which aid is granted. Of particular significance are the grants for social security, first effective in 1936 and supported by federal grants of more than \$400,000,000 in 1942. And this is not the full story: authorities tell us that these grants will grow increasingly larger. No longer do the highways get the lion's share. They are crowded out of first place by the needs of the aged, the orphans, and the sick.⁵⁷

Probable future of federal aid. Federal aid has been opposed on various grounds: that the wealthy states pay much more in taxes to support the system than they receive back in grants-in-aid; that it brings the federal government into state and local affairs, thus encroaching upon the rights of the states; that it stifles local initiative. Students of the subject are

⁵⁷ Federal grants to the states for 1941 may be grouped as follows: agriculture, \$24,800,000; education, \$87,974,000; employment security, \$65,672,000; health, \$24,577,000; public assistance, \$331,171,000; highways, \$168,311,000; W.P.A., \$34,206,000. *State Government*, August, 1942, inside back cover.

not particularly impressed with these objections, and, as a matter of fact, one hears them brought forward but seldom in these times. Opposition to specific grants remains, but the dire prophecies of the speedy end of state sovereignty *via* the federal grant route are seldom heard. In view of the fact that the grants-in-aid appropriations now run to such a large figure (although it is not a large fraction of the total federal appropriations and is much smaller than the total of state grants to local governments) and considering that there is every indication of the continued use and expansion of the grant-in-aid system, it is appropriate to list some of the problems it raises. Professor Joseph P. Harris gives us an illuminating discussion of some of these problems. In summary, they are:

1. States appropriate money for particular services in order to get the "free" federal money, with the result that other state services, services for which no federal grants are made, may suffer for lack of funds. It is suggested that this condition might be avoided by the granting of federal aid to most of the more expensive state functions. This need not increase the total amount granted to the states.

2. Little attempt has been made to determine in a scientific manner the amount the federal authority should appropriate for each aided function. The result has been that pressure groups have had an undue influence over Congress in the matter of particular appropriations. It is essential that there be assembled factual data of the need for each aided service throughout the country.

3. The method of distribution of federal aid among the states needs more careful attention. Distribution on the basis of population is a very poor basis for apportionment. The method of distribution of highway grants, based in equal proportion upon population, area, and mileage of post roads, approximates a scientific approach, while a still more acceptable method, that of distributing a part of the money for forestry aid upon the basis of what adequate protection would cost in each state, is followed by the United States Forest Service.

4. Reasonable standards of administration are not maintained by the simple expedient of requiring the states to pay half, or a lesser part, of the cost of the aided function. The federal authorities should insist upon nonpolitical administration in the states, professional standards and techniques, and other features of efficient administration.⁵⁸

Government by co-operation. As we think back over federal-state and interstate relations, it should become clear that there is a great deal of co-operation between governments. Some of it is required by the Constitution and laws, but much of it is voluntary. Certainly, if the voluntary element were removed, our Union could soon be appropriately styled the dis-United States. The federal grants to the states have been discussed

⁵⁸ Joseph P. Harris, "The Future of Federal Grants-in-Aid," *Annals of the American Academy of Political and Social Science*, January, 1940, pp. 14-26.

as outstanding examples of federal-state co-operation. From among many other examples a few are selected. The first Congress under the Constitution, although it had the power to regulate pilots, simply adopted the existing state laws on pilotage, acting upon the very sound principle that the states were more competent to cope with local conditions. In 1913, in deference to the dry states, Congress prohibited the shipment of liquor into their borders. In matters over which national standards are desirable, the states often adopt a national law or regulation. A majority of the states have found it advantageous to require all airplanes and pilots operating within their jurisdiction to possess federal licenses. State and federal law-enforcement officers co-operate in making arrests. In this connection it should be stated that the Federal Bureau of Investigation with its experts and their collection of fingerprints and other criminal identification records is of invaluable aid to local officers. State courts enforce certain types of federal law and federal courts apply state laws in particular cases. In general administration the two governments often work together, as in public health, vocational rehabilitation, agricultural extension, and employment services.⁵⁹ Perhaps the most significant illustration of such co-operation is the administration of the Federal Social Security Act of 1935, the provisions of which are outlined in a later chapter of this volume. While there is a notable absence of "team work" between the national government and the states in some activities, particularly in the matter of taxation, on the whole it may be said that the advantages of co-operation are recognized and applied in an encouraging number of instances.

Interstate co-operation has also made some progress, but it has been slow. As long ago as 1892 the American Bar Association started a movement for uniform state laws, and the National Conference of Commissioners on Uniform State Laws was created. The commissioners have drafted some fifty model statutes to date; but the discouraging feature is that not many of them have been adopted by a majority of the states. In the matter of admission to certain professions, such as medicine and law, many states now recognize one another's certificates of admission—a matter of concern to a relatively small group, to be sure, but indicative of a desirable spirit of co-operation. The Conference of Governors had its inception in 1908. Designed to consider such matters as uniform laws, taxation, and the appropriate sphere of state government, its annual meetings have turned out to be little more than polite speechmaking parties. The governors change too frequently and the Conference has made no adequate provision for a permanent staff of experts, secretaries and research men without whom no political body can hope to distinguish itself. Among the organizations of recent origin which give promise of developing interstate co-operation may be mentioned the American Legislators' Association

⁵⁹ Mathews, *American State Government* (1934 ed.), Ch. III.

(1925), the Interstate Commission on Conflicting Taxation (1933), and the Interstate Commission on Crime (1935). The Council of State Governments seeks to develop co-ordination and co-operation between groups of states and the forty-eight states. It compiles information for various interstate agencies, and serves as the official clearing house for several of them.⁶⁰

The future of the states. For some years, but particularly during the last dozen, some very distinguished authorities have questioned the capacity of the states to discharge the functions for which our governmental system makes them responsible.⁶¹ Their proposals vary somewhat, but in general it may be said that their idea is that the states should give way to "regions," as a New England Region, a Pacific Northwest Region. Some propose that the great metropolitan areas, often spreading into several states, be cut away from state authorities and established as city-states. It is a fact that present state boundaries do not conform in many cases to economic organization, political interest, social custom, and so on. It is also a fact that the states have come to lean more and more heavily upon the national government, particularly for money. Professor Charles E. Merriam is probably right when he says that the states have been singularly ill-equipped and ill-qualified to serve as guides and guardians to the metropolitan areas. Regionalism which is suggested to supplant or partially supplant the states is nothing new. It existed in Italy under the Romans, in Manchuria under the Chinese, and the United States government makes extensive use of administrative districts of varying sizes for its Federal Reserve Banks, its internal revenue collection, its Home Owners' Loan Corporation, its Food and Drug Administration, and its scores of other services. The advocates of regionalism would carry this principle much further, divesting the states of all or nearly all of their powers, and transferring them to the regions. It may be that we are coming to some such arrangement. But there are many obstacles in the way. Just where are the boundaries of the regions to be drawn? How can the people be persuaded to accept them after they have been drawn? The states have not been conspicuously successful as units of government, but the people in them still have civic cohesion, state pride, and many other sentiments which are likely to obstruct the proposal of the regionalists. We may expect to see more of the sort of regionalism we are now experiencing under the national administration; we may have more regionalism under interstate co-operation; but regionalism which envisages the abolition of the states, or anything approximating it, is largely a dream—although it might come true.

⁶⁰ W. B. Graves, *Uniform State Action* (1934); *State Government*, the monthly publication of the American Legislators' Association, gives a large part of its space to the problem of interstate co-operation.

⁶¹ On this topic see W. Y. Elliott, *The Need for Constitutional Reform* (1935); W. B. Graves, "The Future of the American States," *Am. Pol. Sci. Rev.* (1936), XXX, 24-50; C. E. Merriam, "Metropolitan Regions," *University (of Chicago) Record*, April, 1928.

V. GOVERNMENT OF THE TERRITORIES ⁶²

One other topic may be appropriately considered in this chapter—the territories of the United States. Under the power to carry on war and make treaties, the United States has ample authority to acquire territory. The Constitution gives Congress full authority to govern such possessions through the provision that it “shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” ⁶³ Vast areas of our continental Republic were acquired by war and treaties, and, with the admission of the forty-eighth state to the Union in 1912, the last territorial government in the continental United States disappeared. Beginning with the purchase of Alaska in 1867, lands beyond the sea have been acquired, lands which are still governed as territories. Besides Alaska, the territories and the dates of acquisition are as follows: Hawaii, the Philippines, Porto Rico, and Guam (1898); Tutuila (1899); Panama Canal Zone (1904); Virgin Islands (1917); and several small islands in the Pacific Ocean acquired by discovery and occupation at various times.

The Constitution in the territories. Does the Constitution of the United States apply in its entirety to the territories? Does it “follow the flag”? Many of its provisions show in clear terms that they apply only to national and state relationships. But what of the provision respecting trial by jury, and other provisions designed to protect persons and property? For a long time, it was held that these applied in all territory governed by the United States. It was so understood in 1898 when we annexed territory in which the inhabitants were wholly unfamiliar with American institutions and in which some of the natives were only a short distance removed from savagery. Manifestly, indictment by grand jury, trial by jury, and certain other features of Anglo-Saxon legal procedure could not be made to operate among these peoples. What was to be done? The Supreme Court of the United States was equal to the emergency. In cases before it arising out of the annexations of 1898, the Court prepared the ground by ruling in effect that there were three “United States”: (1) that formed by the states of the Union; (2) the same plus the territory incorporated into the Union; and (3) the states of the Union, plus incorporated territory, plus unincorporated territory, that is, territory which is under the jurisdiction of the United States but to which some provisions of the Constitution need not be applied. Upon the basis of these distinctions, it was held that mere procedural regulations such as indictment by grand jury and trial by jury did not bind Congress in establishing government for

⁶² C. A. and Wm. Beard, *The American Leviathan* (1930), Ch. XXI; Mathews, *op. cit.*, Ch. XX; Willoughby, *op. cit.*, Chs. XXII–XXVIII.

⁶³ Art. IV, sec. 3, cl. 2.

the unincorporated territories. It was held, however, that the fundamental substantive provisions of the Constitution, such as the prohibition against taking property for public use without just compensation and depriving an individual of life, liberty, or property without due process of law, did apply.⁶⁴ The decisions are not altogether convincing from the constitutional standpoint, but they have the merit of practicality.

Territories with representative government. As previously stated, Congress has plenary powers to govern the territories. Congress may allow them local autonomy or not, as it sees fit. It has given all the more important territories some form of representative government. By several acts, of which that of 1912 is most significant, Congress gave Alaska a territorial legislature of two houses, elected by citizens of the United States (Alaskans are such citizens) who are twenty-one years of age and who can read and write English. The legislature is authorized to exercise such powers as are not forbidden by the Constitution of the United States and Congress. Its acts are subject to veto by the governor, but this veto may be overridden by two-thirds majority. Congress may disallow a legislative act—exercise an absolute veto. The territorial governor and other administrative officers, judges, attorneys, and marshals are appointed by the President and the Senate for a term of four years. General administrative matters are under the supervision of several of the great departments in Washington, the Department of the Interior carrying the greater part of the responsibility. The only part the territory takes in the government of the United States is through its popularly elected delegate or commissioner, who sits in the House of Representatives at Washington. The part is extremely small, for the delegate has no vote. The Hawaiian territorial government need not detain us. It is the same in all essentials as that of Alaska. The same may be said concerning Porto Rico, although the President is given a little more direct hand in its government and considerable supervisory authority is lodged with the Department of War. Both Hawaiians and Porto Ricans are citizens of the United States.

Coming to the Philippines, now temporarily under the military might of Japan, we still fail to find any essential differences between their former representative government and those of the other three territories. The Islands were allowed a popularly elected lower house in 1902; and by the Jones Act of 1916, which provided for a general reorganization of the government, they were given an elected upper house. A few members of both houses, representing the non-Christian districts, were appointed by the Governor General. An interesting feature of the Philippine government was the Council of State, composed of six or seven high administrative officials and of the presiding officers and the majority floor leaders of the two legislative chambers. This was a purely advisory body and it was

⁶⁴ Willoughby, *op. cit.*, Ch. XXVII, and cases there cited.

not provided for in the organic law. It was nevertheless quite useful as a connecting link between the executive and legislative departments and a valuable institution in preparing the Islands for self-government.

The question of Philippine independence. The only one of the territories discussed which has had any serious agitation for independence is the Philippines. This is quite natural, since we took over the Islands with the understanding that we were to prepare them for self-government and then set them free. The Jones Act (1916) announced that it was our purpose to withdraw as soon as a stable government could be established, and its liberal provisions respecting local autonomy were designed to hasten the establishment of such government. With the return of the Republicans to power in 1921, the Filipinos received a setback and it seemed that independence was something to be achieved only in the very distant future, if at all. Appointed by President Coolidge to investigate in 1926, Col. C. A. Thompson advised against immediate independence on economic, political, and religious grounds, although he affirmed his belief in ultimate independence. Several years later, Secretary of War Hurley visited the Islands and made a similar recommendation against the granting of immediate independence.

But before Hurley's report was made, there came a surprising change in attitude on the part of many Americans. Surprise soon vanished, however, when it was discovered that the changed attitude was based upon economic realities. Free trade which the Islands enjoyed with the United States was injuring American industries, particularly the sugar industry. Industries thus affected wanted independence granted so that our tariffs could be made operative against Philippine exports. Organized labor was also for independence; for Filipino immigration on the Pacific Coast was sufficient to produce a noticeable competition with American labor. Independence would mean that we could, with clear conscience, take steps to exclude Filipinos. We had always had spokesmen for Philippine independence, but they stood on the grounds of political ethics. Now it was shown that there were some very earthy reasons for granting independence.

It is therefore easy to understand why Congress (January, 1933) passed the independence bill. So strong had congressional sentiment for independence become that the vigorous veto of President Hoover was promptly overridden. But the terms of this bill were not satisfactory to the Filipinos and they rejected it. In March, 1934, Congress passed a new independence bill, differing only in minor details from the first, but differing sufficiently to win for itself a unanimous vote in the Philippine legislature. Under the provisions of this law, a Filipino convention drafted a constitution acceptable to the President of the United States and the Filipino people. In further conformity to the law they elected officers for their new government and the United States replaced the Governor

General with a High Commissioner whose powers are not particularly significant as compared with those of the former Governor General. This new government was inaugurated on November 15, 1935. During a ten year period beginning on that date the United States was gradually to withdraw her political and economic control of the Islands. In like manner, the Islands were gradually to lose their privileges, particularly trade privileges, which they had enjoyed as a part of the United States. What happened in 1941-1942 is common knowledge. The United States gave its pledge that the invader will be driven out and independence established. The loyalty of the Filipinos to the United States and their courage in defending their homeland should make the fulfillment of this pledge a prime obligation of the American people.

Territories with unrepresentative government. We must say just a word about the other possessions of the United States. They enjoy very little local autonomy. The Virgin Islands are largely under the control of a governor and other officers appointed by the President and the Senate, although two legislative councils, some members appointed by the governor and some elected by the citizens, have some share in legislative matters. These Islands have no territorial delegate in the House of Representatives. American citizenship was conferred upon the inhabitants by an act of 1927. The Panama Canal Zone is under a governor chosen by the President and the Senate. There is no legislative body in the Zone, and laws and ordinances are made by executive decree or by Congress. This form of government is probably advisable, since our chief interest there is to keep open the Canal. Guam and our Samoan possession, Tutuila, are governed by naval officers acting under the Department of the Navy and the President. Although this sort of government may seem objectionable, there is some justification for it, considering that the islands serve us primarily as naval bases.

Protectorates. Several small republics to the south of us, while nominally independent, are in reality subject from time to time to the control of the United States. Such countries are commonly designated as protectorates. By treaty agreement or under the broad sanction of the Monroe Doctrine or paramount national interest, we have intervened in Cuba, Haiti, Santo Domingo, Nicaragua, and Honduras. Warships and marines have been sent to "protect American life and property," a function which has sometimes involved such matters as conducting elections and supporting a particular native government! This policy has been bitterly criticized by many spokesmen of Latin American countries, and by no means all of our own countrymen justify it. About 1927, our intervention in Nicaragua was particularly assailed. During the past decade, however, we have achieved better understanding with the other American republics. The "good neighbor" policy announced by President Roosevelt is more than a mere phrase. The Seventh Inter-American Conference at Monte-

video in 1933 was marked by the utmost sincerity and confidence on all sides. The Conference made a number of recommendations for the promotion of worthy enterprises among the republics. It drafted a number of treaties, the most significant of which provides, among other things, that "no state has the right to intervene in the internal or external affairs of another." The United States ratified this treaty in June, 1934. About the same time it abolished the protectorate it had held over Cuba since 1903. That the substitution of the good neighbor policy for one of imperialism has done much to strengthen the faith of the other American Republics in the United States of America is demonstrated by the measures of support these countries have given the great Republic of the North since she was attacked by the Axis powers.

The District of Columbia. The government of the capital city stands in a class by itself. The Constitution gave Congress the authority to decide upon the place for the seat of the government of the United States and to exercise exclusive legislation over such district. For a long time the inhabitants of the District of Columbia were allowed to manage their local affairs, but since 1874 Congress has exercised complete control. Three commissioners, two civilian residents of Washington and an army engineer, appointed by the President and the Senate, are in direct charge of administration. Congress is the "City Council" and the President is the "Mayor." The people of Washington are not officially consulted about their government. Even the taxes they must pay for local enterprises are determined by the commissioners, subject to the approval of Congress. But since so many people from all over the country go to Washington on various missions and make use of its public services, Congress appropriates a part of the local budget from the national treasury. If residents of Washington have little part in their local government, they have no part in the national government. They have no representatives in Congress, and they have no voice in electing the President. They are disfranchised. It is true that many of the inhabitants retain a legal residence and may vote in some other place, as did President Hoover, who voted in Palo Alto, California. This, however, is decidedly inconvenient for the majority of Washington people; and, even if they all managed to vote elsewhere, they would still have no control over their local government. Agitation breaks out from time to time against this "taxation without representation," and the demand is made for political rights; but they are answered by others who say that Washington was created by the national government, is well governed, and that there is no good reason for a change.

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State Constitutions



In previous chapters our attention has been devoted primarily to the Federal Constitution. While that instrument restricts the states in some important particulars and provides for the essential phases of interstate relations, it does not establish systems of government for the individual states. Each state provides for its own type of government through its own constitution, subject, of course, to the important limitation that such constitutions shall not violate the Federal Constitution or the treaties or laws made under its authority.

I. CONSTITUTIONAL CONVENTIONS ¹

Our first state constitutions were commonly made by legislative assemblies, or by conventions of more or less irregular character. In some states, constitutions may still be made or completely revised by the legislatures; but the common practice is to assign these tasks to conventions chosen by the people for the sole and express purpose of drafting a constitution. The constitutions of about a fourth of the states do not provide for the calling of constitutional conventions; but it is held that, even where the provision is not made, the legislature may take the necessary steps for calling the convention.² Since the states, unlike the nation, have not been slow to revise completely their fundamental laws, the number of such conventions has passed well beyond the two hundred mark. Among recent constitutional conventions, we may mention those in Massachusetts (1917-19), Illinois (1920), Louisiana (1921), Missouri (1922), New Hampshire (1930), and New York (1938).

Calling the convention. A constitutional convention is called in accordance with provisions of the existing constitution, or by an act of the state legislature. The constitutions of six states provide that the people

¹ F. G. Bates and O. P. Field, *State Government* (1939 ed.), Ch. 4; W. F. Dodd, *The Revision and Amendment of State Constitutions* (1910), and *State Government* (1928 ed.), pp. 93-110; Austin F. Macdonald, *American State Government and Administration* (1940 ed.), Ch. 4. See also brief article and interesting table by W. B. Graves and I. J. Zipin, "State Constitution and Constitutional Convention," *Book of the States* (1942), 45-55.

² Rhode Island was long an exception to this rule, but, in 1935, its highest court ruled that the legislature might exercise the authority to call a referendum on the question of holding a constitutional convention. (*Am. Pol. Sci. Rev.*, XXX, 537-540.)

shall vote on the question, "Shall a constitutional convention be called," at regular intervals, varying from seven to twenty years. Although the question of a constitutional convention was in no sense a live issue in the campaign, the people of New York voted in 1936 for a convention in 1938.

Choosing the delegates. Usually, delegates are chosen from state legislative or senatorial districts. Sometimes a few delegates are chosen at large, that is, by the voters of the entire state. By the latter method it is possible to secure the talent of several outstanding individuals who might live in the same district. In any case, the personnel of a convention is usually somewhat higher than that of the ordinary legislature, for the reason that men who can ill afford to sit regularly in legislative bodies are willing to serve in this important capacity.

Organization and procedure of conventions. A convention, on the average, has around two hundred delegates. Its organization is not unlike that of the typical lower house of a state legislature. The delegates elect a presiding officer, and arrange for the various clerks and assistants needed by such bodies. Rules of procedure are adopted and a number of committees are appointed. Each committee is made responsible for certain parts of the constitution.³ Committees receive proposals from members of the convention or from individuals outside the convention. They listen to the exhortations and warnings of interested citizens whom they allow to appear before them. From the mass of proposals and suggestions made and from the ideas of its own members, a committee prepares an article or sections of an article, which it presents to the whole body of delegates. Here the proposal is discussed and possibly accepted. It is more likely, however, to be adopted with amendments or returned to the committee for further consideration. This process goes on until at length a constitution is drafted.

Popular ratification of constitutions. While there are a few exceptions to the rule, the common practice is to refer the work of a convention to the people for their approval. The simplest method of doing this is to submit the whole constitution as a unit and let the voters accept or reject it as such. This method of submission is not altogether satisfactory, for the reason that an instrument containing a few features which do not commend themselves to the voters may result in the defeat of a constitution which they would otherwise be pleased to accept. This method proved disastrous to the constitution submitted in Illinois in 1922, and it has not been commonly followed in the last score of years. Instead, a number of states have submitted their new constitutions in a series of constitutional amendments. It is obvious that by this method the voters are enabled to reject

³ Vermont, Pennsylvania, New Jersey, and a few other states have appointed constitutional commissions for the purpose of making preliminary investigations on proposed constitutional changes. See Dodd, *State Government*, pp. 102-103, and William Miller, "The Report of New Jersey's Constitutional Commission," *Am. Pol. Sci. Rev.*, XXXVI, 900 (October, 1942).

what they do not like, without rejecting the provisions with which they are satisfied. This plan has been followed by Massachusetts and New Hampshire almost from the beginning of their statehood, and by Ohio and Nebraska in recent years. Following a plan very similar to this, Illinois (1870) and New York (1915) submitted revised constitutions as a whole, but at the same time permitted the electorate to vote upon certain controversial sections separately.

II. AMENDING STATE CONSTITUTIONS ⁴

Legislative proposals. We have just learned that constitutions are almost invariably made or completely revised by conventions. Ordinary amendments may be proposed by the same method, but simpler processes are usually employed. Amendments may be proposed by the legislatures, or by the voters. The method of amendment by legislative proposal dates almost from the time of the adoption of the first constitutions. At the present time, it may be used in all states except New Hampshire, in which state amendments may be originated only by a constitutional convention. While the process varies somewhat, the common procedure is for the legislature to propose the amendment by a three-fifths or two-thirds vote. Some states require the affirmative action of two successive legislatures, but in such states a simple majority vote in the legislatures is usually held sufficient for proposing an amendment. In some states there are serious limitations as to proposals. For example, the Vermont Constitution forbids the proposal of amendments more frequently than once in ten years, and the Constitution of Tennessee fixes the period at six years and requires the affirmative action of two successive legislatures for a proposal. It is obvious that such limitations may unduly delay or even defeat needed amendments.⁵

Popular approval of legislative proposals. When a proposal has passed a legislature in accordance with the requirements of the state constitution, it is then necessary, except in Delaware, to submit it to the people for approval. The prevailing practice is that approval by a majority of those voting on the amendment makes it a part of the state constitution. There are exceptions to this rule, however. Ten or more states require a majority of all those voting in a general election, a majority much more difficult to win than a majority on the amendment; for many people who will not take the trouble to vote on amendments submitted in the same election will vote for candidates for office. It has happened in Illinois several times that an amendment which receives, let us say, 600,000 affirmative votes and 200,000 negative votes is nevertheless defeated because 2,000,000 people vote in the same election for candidates, thus leaving the

⁴ See reference for sec. I.

⁵ Dodd, *State Government*, pp. 97 ff.

600,000 far short of the required majority of all votes cast in the election. Other states having this requirement have had similar experiences. Special elections in which constitutional amendments alone are submitted would, of course, secure the ratification of amendments, if a majority of those voting approved them. A less expensive solution of the problem would be for the states which require a majority of those voting in the election to join the ranks of the greater number of the states, which require only a majority of those voting on the amendment. For a number of years the tendency has been in this direction.⁶

Amendment by popular initiative. Oregon having blazed the trail in 1902, thirteen states⁷ now have constitutional provisions which authorize the amendment of their fundamental laws by popular initiative. An individual or a group may draft a proposal. The next step is to have the proposed amendment endorsed by the requisite number of petitioners. In some states, the number required to make the petition effective is definitely fixed. For instance, 25,000 signatures are required in Massachusetts. Other states require a number of petitioners equal to a certain percentage of the vote cast in the last state election. This percentage is eight in California and Oregon, but the average requirement is about ten per cent. In order to insure against proposals having a purely local basis, several states require that signatures shall be secured in a number of counties or districts. For example, Nebraska requires fifteen per cent of the voters of the state and five per cent in two fifths of the counties for an effective petition.⁸

When a proposal has received the required number of signatures, it is then submitted to the voters of the state for their approval or rejection,⁹ usually on a regular election date. In several states, a proposed amendment is adopted if it is approved by a majority of those voting on it. But in Oklahoma, a majority of all those voting in the election is required, while the constitutions of a few other states provide that the majority voting affirmatively on an amendment shall secure its adoption only when such majority is a given percentage, say, thirty or thirty-five per cent, of the total votes cast in an election.¹⁰

Number and character of amendments. During the past forty years, about 1,800 amendments have been proposed by state legislatures, and more than 200 have been proposed by the popular initiative. Roughly speaking, three fifths of those proposed have been adopted. Some of these

⁶ *Ibid.*

⁷ They are: Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon. The Mississippi amendment providing for popular initiative was declared void by the state supreme court on the ground that it had not been legally adopted. *Power v. Robertson*, 93 So. 769 (1922).

⁸ *Illinois Constitutional Convention Bulletins* (1920), No. 2, pp. 81-82.

⁹ In Massachusetts and Nevada the petition must first be referred to the legislature.

¹⁰ *Illinois Constitutional Convention Bulletins*, No. 2, pp. 81-82.

deal with important matters; but the greater number relate to trivial affairs or to unimportant phases of important affairs. Many amendments touch the important subject of taxation. Others deal with debt limits, elections, the suffrage, the initiative, the referendum, the recall, labor, corporations, industrial undertakings of the state, and what not.¹¹ The many specific provisions of state constitutions necessitate frequent amendments; for such provisions are often found to stand in the way of small changes in governmental organization or policy.

Informal development of state constitutions. The articles and sections of the state constitutions and the formal amendments of the same do not tell the whole story of state government. In a previous chapter, considerable space was given to the informal methods by which the Federal Constitution has been developed.¹² Although state constitutions usually contain elaborate provisions, they have to a considerable extent been similarly expanded and developed by habits and practices, by important acts of state legislatures, and by judicial decision.

III. CONTENT OF STATE CONSTITUTIONS ¹³

Having learned how state constitutions are made and amended, we are now to examine their content. In making this analysis, we shall at the same time note certain important changes which have taken place in the structure and character of state governments during the hundred and fifty years of their existence. These changes, in the main, indicate the progress of democracy. They show also that there are fewer important differences between the governments of the states at present than there were at the time they won their independence. The primary cause for this growth in similarity is that the newer states, in framing their constitutions, consciously, sometimes almost slavishly, imitated the older states, and that all the states, in revising or amending their fundamental laws, naturally adopted principles which were deemed to have worked well in other states.

1. The bill of rights. Every state constitution contains a bill of rights. These rights include such cherished guaranties as indictment by grand jury, trial by a jury of twelve individuals, freedom of speech and of the press, and the right of petition. Several of these rights have been modified in a number of the states, especially in the newer states. A few examples of these changes are submitted. As long ago as 1879, the California Constitution provided that an accused might be held for trial upon information furnished by a magistrate, as well as by the time-honored method of indictment by a grand jury. Other states have adopted this simplified

¹¹ See the Constitutions of California, Oregon, North Dakota and other Western states.

¹² Ch. I, sec. III.

¹³ C. A. Beard, *American Government and Politics* (1935 ed.), Ch. XXII; Dodd, *State Government*, Ch. III, and pp. 78-92; A. N. Holcombe, *State Government in the U.S.* (1931 ed.), Chs. IV-V. See also various state constitutions.

process. The jury trial itself has been modified. Utah authorizes the trial of cases by a jury of eight persons, whereas the old common law requires twelve. Oklahoma authorizes a verdict in some cases by three fourths of the jurors, in place of the unanimous verdict required by the common law. The old constitutions commonly provided that the privilege of the writ of *habeas corpus* should not be suspended except in case of rebellion or invasion, while some of the newer constitutions stipulate that it shall never be suspended by the state authorities. In order to insure greater freedom of expression, a number of states now admit as evidence the truth of the matters alleged to be libelous in all criminal prosecutions for libel.

RESTRICTIONS ON CORPORATIONS. Many of the rights guaranteed to natural persons are also enjoyed by corporations or artificial persons. Some states have felt that corporations reap too many advantages from these rights, and they have restricted their application to these business concerns. For example, the Oklahoma Constitution, while it amply safeguards the people of the state against unreasonable search and seizure, expressly states that the books and records of corporations shall be open at all times to public officers who are charged with the responsibility of seeing that they conduct their business in conformity with the laws. We should add that, for the purpose of protecting their people from what they regard as exorbitant rates charged by corporations and also for the purpose of supplying services for their citizens which privately owned corporations do not ordinarily provide, a few states have through constitutional provisions authorized their governments to engage in various occupations and businesses. North Dakota has owned and operated—among other establishments—banks, grain elevators, and flour mills.¹⁴

PHILOSOPHICAL PROVISIONS. While a greater number of clauses in the bills of rights are of substantial nature and are enforceable in court, some are simply expressions of social philosophy and have no material value. The Vermont Constitution supports virtue in the following language: "Every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God"; and the whole body of inhabitants are advised "that frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the blessings of liberty, and keep government free." A number of other constitutions contain similar provisions which have no legal effect.

Provisions identical with the Federal Constitution. State constitutions almost invariably impose certain restrictions upon state governments which are identical with limitations imposed upon such governments by the Con-

¹⁴ For examples of the newer provisions in bills of rights, see the Constitutions of Oklahoma, Arizona, and North Dakota.

stitution of the United States. The outstanding example of this is the duplication in state constitutions of that provision of the Fourteenth Amendment of the Federal Constitution which stipulates that no state shall "deprive any person of life, liberty, or property without due process of law."¹⁵ The prohibition in the Fourteenth Amendment is quite sufficient; for the national courts do not hesitate to set aside state acts which run counter to it. This same prohibition in the state constitutions is interpreted finally by the state courts. Therefore, it happens that the phrase is interpreted somewhat differently in the several states, and, more mischievous, that state courts sometimes give it an interpretation which nullifies desirable state laws where such laws would be allowed to stand if tested by the somewhat less rigid standard of "due process" as established by the federal courts.¹⁶

2. The three branches of government. The second general division of a state constitution deals with the legislative, executive, and judicial departments. The state legislature is the lawmaking body for a state as Congress is the lawmaking body for the nation. Three states¹⁷ started their careers with legislatures composed of a single chamber, but they later joined the ranks of their sister states who employed two legislative chambers from the beginning. The fact that Congress was organized on the bicameral plan had a great deal of influence in bringing all the states to accept this system of representation. The original idea was that property should have representation in the "upper chambers" of the state legislatures; but, one after another, the states adopted manhood suffrage for choosing the members of both branches of the legislature, so that property was no longer represented in one body more than in the other. Yet the dogma that one house should and would check any hasty action of the other was generally accepted. Furthermore, there was reason for retaining the upper house because it had not only legislative powers but also some very important executive and judicial powers.¹⁸

CURTAILMENT OF LEGISLATIVE POWERS. The constitutions drafted during the Revolutionary period were most generous in granting power to state legislatures. But it was not many years until the fear arose that the legislatures had too much power, and this fear was quickened by their unwise use of power. Even before our Federal Constitution was adopted, some of the states were beginning to withdraw powers from the legislatures. Governors very early came to be elected by popular vote in nearly all the states. The privilege of choosing judges and a number of other officers was very generally extended to the people before 1850. Before the date

¹⁵ The prohibitions with regard to *ex post facto* laws, bills of attainder, and laws impairing the obligations of contracts are also usually duplicated.

¹⁶ Dodd, *op. cit.*, pp. 123-124.

¹⁷ Pennsylvania (1776-1790), Georgia 1777-1789), and Vermont (1777-1836). Nebraska's present-day experiment with the one-house legislature is discussed in Ch. 15.

¹⁸ Holcombe, *op. cit.*, pp. 91-93.

just mentioned, it was found highly desirable to place a constitutional limit upon the amount of money a legislature might borrow on the credit of the state. In like manner, legislative errors in bank regulation led to limitations upon their authority in this field. When legislatures showed a tendency to abuse their powers to issue charters to cities and private corporations, the abuse was met by another constitutional limitation. Indeed, a great deal of state constitutional history has to do with the curtailment of legislative powers. Practically every state now has a long list of prohibitions addressed especially to the legislature.¹⁹ Although the legislature still has substantial lawmaking power, it falls far short of the power with which the Fathers originally endowed it.

THE GOVERNOR. The position of governor has steadily risen in our states. An officer very much dependent upon the legislature in the typical state a century and a half ago, he is now a chief executive of importance and he is expected to be a leader in the affairs of the state. His emancipation began when the legislature lost the privilege of electing him. From time to time, constitutions have added to the importance of his office by increasing his appointing power; and the legislatures have frequently named the governor as the logical appointing officer, even where they might constitutionally vest that authority elsewhere. It must be said, however, that in the majority of the states the senate still has the authority to accept or reject the persons he names for office. Another very important power which two or three states gave their governors about 1780, and which is now withheld only in North Carolina, is the veto. In respect to an ordinary bill, the governor must veto the whole of it or accept it; but more than two thirds of the states now authorize him to veto separate items of an appropriation bill. Washington and South Carolina even go to the extent of authorizing the veto of a part of any bill.²⁰ The general powers of the governor have been further augmented in those states which have reorganized their administrative system on the principle of concentration of authority in the hands of the chief executive.²¹

THE COURTS. The judiciary did not occupy the important place in our early state governments that it occupies today. Its authority and independence increased as state after state, during the first half of the nineteenth century, substituted popular election of judges for the earlier method of choice by legislatures. Furthermore, the states have come more and more to the practice of providing in their constitutions for the organization of the courts, thus increasing their independence of the legislatures in this respect, although the representatives still have considerable authority in relation to the details of judicial organization and procedure. Perhaps the most important aspect of the present independence of the judi-

¹⁹ Dodd, *State Government*, pp. 61, 82-84, 114-115.

²⁰ *Ibid.*, pp. 80, 229-237; Holcombe, *op. cit.*, pp. 115 ff.

²¹ Examples: Illinois, Nebraska, Idaho, Ohio.

ary is seen in its power to review acts of the legislative bodies. This authority to pass upon the constitutionality of statutes was exercised somewhat hesitantly at first; but its use by the Supreme Court of the United States, together with the general strengthening of the state judiciary during the fifty years following the establishment of our first state governments, definitely fixed the practice in the state governmental systems.²²

From this brief survey of the three main divisions of power in the states, the conclusion is obvious that the executive and the judiciary have steadily grown in importance and that this growth has usually been accompanied by a diminution of legislative authority. In other words, a redistribution of functions has taken place which brings our state political systems much closer to the principle of the separation of powers than were the original systems, whose designers professed so much admiration for the principle.

3. Taxation and public debts. In addition to the bill of rights and the articles dealing with the three historic departments, present-day state constitutions usually contain other important articles dealing with finance, public and private corporations, education, the suffrage, and so on. Typical restrictions concerning taxation and state debts run as follows: Revenue shall not "exceed in any one year four mills on the dollar of the assessed valuation of all taxable property in the state. . . . Taxes shall be uniform upon the same class of property." State "debts shall never in the aggregate exceed the sum of \$200,000, exclusive of what may be the debt at the time of the adoption of this constitution. . . . The debt of any county, township, city . . . or any other political subdivision, shall never exceed five per centum upon the assessed value of the taxable property therein; provided, that any incorporated city may by a two-thirds vote, increase such indebtedness three per centum."²³

4. Corporations. We have already learned that a number of states expressly restrict the method of chartering corporations and subject them to various conditions not required of individuals. Thus the constitution of Ohio stipulates that corporations shall not be formed except by general laws, and that all such laws may from time to time be altered or repealed; that corporations may be classified and be made subject to supervision and regulation by officers of the state; that no right of way shall be appropriated to the use of any corporation unless full compensation be paid. Other restrictions of a similar nature are imposed, covering about a page in the constitution. Some of the newer constitutions, especially those of the Southern and Western states, regulate corporations in much more detail. They impose restrictions with regard to rates and charges for service, make specifications concerning the quality of the service to be performed, forbid the granting of passes to public officers, prohibit monopolies, attempt to prohibit "stock watering," and establish corporation commissions to ad-

²² Holcombe, *op. cit.*, pp. 119 ff.

²³ Constitution of North Dakota, Articles XI and XII.

minister these and many other provisions which relate to incorporated enterprises. In addition to these regulations vitally concerning corporate business, state constitutions commonly contain restrictions with regard to municipal corporations. These have to do with the manner in which city charters may be issued, and with such matters as the limits of the city authorities to tax, borrow money, and engage in business usually reserved for private individuals or corporations.

5. Education. State constitutions almost invariably contain sections with reference to education. This is true even of some of the older constitutions. For instance, Vermont's fundamental law, proclaimed in 1793, declared that "laws for the encouragement of virtue and prevention of vice and immorality, ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town." The newer constitutions almost invariably provide in some detail for public education. Thus the constitution of North Dakota requires the legislature to establish and maintain "a uniform system for free public schools throughout the state, beginning with the primary and extending through all grades up to and including the normal and collegiate course." Other provisions concerning the administration of schools and school lands cover four or five pages.

6. Labor. The states in our day not infrequently give labor some special consideration in the constitutions. For instance, in Oklahoma child labor is prohibited in hazardous employment; the eight-hour day is established for work underground; the right to contract for convict labor is denied; and other protection is extended to laborers.

Miscellaneous provisions. A great variety of other matters are touched upon in the typical state constitution. These include banking and insurance, charities and corrections, agriculture, public highways, county and township government, to mention some of the more important items. Then, constitutions often make provision for various executive boards, such as boards of pardon, railway commissions, tax commissions, and boards of education. Finally, we have the provisions for constitutional amendment, which provisions, as we have learned from previous discussion of the amending process, are rather elaborate in some states.

Length of state constitutions. The older constitutions are relatively brief, as instanced by the fundamental law of Vermont, which occupies fourteen pages in Kettleborough's collection of state constitutions; while the newer instruments of government are ordinarily much longer, the Constitutions of Oklahoma and Louisiana covering fifty-eight and eighty-seven pages respectively. The difference in the length of constitutions does not necessarily indicate any great difference in the structure of state governments; for states with short constitutions frequently deal by statute with matters which are cared for in other states by constitutional provisions. If, for instance, the state's fundamental law does not contain elaborate pro-

visions concerning the regulation of corporations, it does not follow that the state allows such organizations to follow their own sweet will in all things. It may quite adequately regulate corporations by statutes alone.

Constitutions and statutes. This brings us to a brief consideration of the wisdom of detailed provisions in constitutions. Originally, constitutions laid down the fundamental principles of government and left to the state legislatures the authority to fill in the detail by the enactment of statutes. For a number of years, the tendency has been more and more to place this detail in the constitutions. Constitutions of this type must be frequently amended, if they are to keep up with changing conditions; and it is not possible to amend them often, if the methods of amendment are not made simple and easy. Unfortunately, framers of constitutions with these detailed and temporary provisions have not always arranged for the simple amending process which should accompany them. Consequently, states like Nebraska and Illinois have found themselves seriously handicapped with constitutions badly in need of amendments difficult to obtain.²⁴ Perhaps we should have no quarrel with states who distrust their legislatures and for that reason place rather trivial matters in the constitutions instead of leaving them to be disposed of by statute; but such states should follow the example of Oregon and California and some other commonwealths and make their constitutions easy to amend.

The voters' part in government. One other feature of our present state constitutional systems calls for attention. That is the part the voters play in the conduct of government. Not only have the restrictive qualifications for voting been abolished, but the voters are called upon to choose practically all of the important officers of the states; and, in many cases, they elect officers to posts which might much better be filled by appointment. In like manner, their suffrage extends to many city and county offices. But this is not all. About a fourth of the states authorize the voters to recall officers²⁵ whom they have elected. By this means the people are able in some degree to hold the officers to their pre-election pledges and to prevent them from disregarding the popular will on new issues which may arise. Furthermore, some twenty states permit the people to use some form of the initiative, a means by which the voters may propose amendments and statutes and vote upon the adoption of the same. We have learned that nearly all the states hold a popular referendum on the adoption of constitutions and constitutional amendments after they have been proposed by conventions or legislatures. Twenty-one state constitutions provide also that the people, by circulating a petition, may have an ordinary legislative enactment referred to them for their approval or rejection.

²⁴ Dodd, *State Government*, pp. 90 ff., 104 ff.

²⁵ Judges are excepted from the recall in several of these states.

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Civil Rights

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In any democratic country the individual has assurance that his government will not deprive him of fundamental civil rights. It is true that England and some other countries have no ironclad guaranties that the rights of an individual will be respected by the government; but in such countries ordinary law, custom, and the force of public opinion are deemed sufficient guaranties that the essential rights of all persons will be scrupulously observed.

I. CIVIL RIGHTS IN AMERICAN CONSTITUTIONS

A bill of rights in each of our constitutions. The state constitutions adopted in the period of the Revolution, and at a time when liberals in the Western world were thinking and writing a great deal about the rights of man under government, included, as one of their most important sections, a bill of rights. The states admitted to the Union since 1789 have followed the example of the original states. The framers of the Federal Constitution did not incorporate a bill of rights into that instrument, because a number of the members of the Philadelphia Convention felt that, since the national government was to be one with expressly delegated powers, no limitations were necessary. Their idea was, of course, that delegation was itself a limitation in that it implicitly denied to the national government the right to exercise any powers other than those delegated.¹ On the other side, it was ably shown by popular leaders that the government might become offensive in the exercise of those powers which were delegated to it.² Furthermore, in those days the people were fearful of a central government and especially jealous of their liberty. Then there was the powerful influence of example. The state constitutions contained bills of rights. Why should the Federal Constitution constitute an exception? In response to the popular demand, the desired restrictions upon the national government were added to the Constitution in the form of the first ten amendments in 1791.

Protection of individual by two constitutions. It is clear from the above that a person residing in one of the states of the United States is protected from government encroachment by two constitutions—by the

¹ Hamilton's argument—*The Federalist*, No. LXXXIV.

² Madison's argument—*Annals of Congress*, Vol. I, pp. 440 ff.

Federal Constitution and by the constitution of the state in which he resides. The separate spheres of these constitutions in giving one personal security can be understood by illustration. Let us take the case of Olaf Hansen, a resident of North Dakota. He is protected in four ways. *First*, the first eight amendments ³ (the ninth and tenth are not important in this connection) of the Federal Constitution, plus Article I, section 9, clauses 2 and 3; and Article III, section 2, clause 3; and Article III, section 3, enumerate the rights in which he is secured against the national government and against the national government *only*. *Second*, Article I, section 10, clause 1, and the Fourteenth Amendment, section 1 (the second sentence), represent the civil rights in which he is secured against any arbitrary act of the State of North Dakota. *Third*, the Thirteenth Amendment affords him protection from both the national government and his state. *Fourth*, the bill of rights in the Constitution of North Dakota protects him against the government of that state.

Duplicate and supplementary guaranties. The bill of rights of his state duplicates to some extent those provisions of the Federal Constitution which protect him against his state government: for example, the Federal Constitution prohibits his state from passing an *ex post facto* law; the Constitution of North Dakota carries the same prohibition. For the most part, however, his rights under the Federal Constitution are supplemented, not duplicated, by his state constitution: for example, the Constitution of the United States gives him the right of trial by jury in the *national* courts, while the state constitution gives him that right in the *state* courts. It is apparent that Olaf Hansen's civil rights differ from those of John Austin in Kentucky only in so far as the bills of rights of the two states differ. Since there are seldom any essential differences between the bill of rights of one state and that of another the people in the several states of the Union enjoy substantially the same civil liberties.

II. CIVIL RIGHTS IN GENERAL ⁴

Let us now turn our attention to some of the more important civil liberties.

1. Personal freedom. The right of a man to be free, a right so fundamental as not to call for any positive expression concerning it in most countries, was not established in our country until 1865, when the Thirteenth Amendment gave freedom a constitutional basis in the following language: "Neither slavery nor involuntary servitude except as a punish-

³ The student should turn to the Constitution and read these parts as they are referred to.

⁴ C. K. Burdick, *The Law of the American Constitution* (1922), Chs. XIII, XIV, XVI, XXVI; J. P. Hall, *Constitutional Law* (1910), pp. 83-90; J. M. Mathews, *The American Constitutional System* (1940 ed.), Ch. XXIV; W. W. Willoughby, *Principles of the Constitutional Law of the United States* (1930 ed.), Chs. LVI-LVII.

ment for crime whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction." A great many of the state constitutions contain this clause against slavery at the present time, but since the Thirteenth Amendment prohibits slavery in any part of the United States or its territory, the state guaranties are simply duplications.

ITS LIMITATIONS. Basing his argument on the Thirteenth Amendment, one Robertson, a seaman who had deserted his vessel, claimed that the statute of the United States under which he had been arrested and returned to his ship was unconstitutional in that it forced him to "involuntary servitude." The Court took the common-sense view that Robertson had voluntarily entered the service and that the law forcing him to live up to his contract was not contrary to that Amendment. According to the Court, the words "involuntary servitude" were used in the Thirteenth Amendment in addition to the word "slavery" in order to cover possible attempts to introduce the Mexican peonage system and the Chinese coolie trade, either of which would amount to practically the same thing as slavery. The Court further pointed out that neither the Amendment in question or any other civil rights provisions of the Federal Constitution were "intended to lay down any novel principle of government," and that since seamen had been forced to live up to their agreements in other countries from time immemorial and in the United States since our government was founded, "it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts."⁵

Nor did the newly emancipated Negro find any novel principles in the Amendment. When Congress passed an act for the purpose of preventing any discrimination against Negroes at inns, theaters, and similar public places, the Supreme Court held that discrimination on account of race or color did not constitute slavery and that the act therefore went beyond any power granted to Congress by the Thirteenth Amendment.⁶ If, however, a state by legislative act attempts to force a laborer, who is a debtor to his employer, to pay his debt, work out the debt in the service of his employer, or go to jail,⁷ such action is held to be contrary to the Thirteenth Amendment, since a statute of this kind would make a peon of the debtor—reduce him to involuntary servitude.⁸ In such cases the creditor may, of course, seek redress through civil action for

⁵ *Robertson v. Baldwin*, 165 U.S. 275. (1897). But by law seamen now have liberty of action which was denied in Robertson's case.

⁶ *Civil Rights Cases*, 109 U.S. 3, 20-25 (1883).

⁷ Such statutes were passed by some of the Southern states for the purpose of getting easy control over the colored labor, which was sometimes shiftless and irresponsible.

⁸ *Bailey v. Alabama*, 219 U.S. 219 (1911). A somewhat similar statute was still on the books in Georgia until quite recently, when the Supreme Court of the United States declared it void. *Daylor vs. Ga.*, 62 S. Ct. 415 (1942).

breach of contract. This action against a debtor with no property may not satisfy the creditor, but the courts, acting under the Thirteenth Amendment, have decided that liberty for the debtor is better than the pound of flesh for the creditor.⁹ We may conclude then, that the Thirteenth Amendment of the Federal Constitution and similar provisions in some of the state constitutions prevent any form of slavery or involuntary servitude as those terms are understood by the ordinary man; but that these guaranties of personal freedom do not serve to release persons from ordinary obligations which have been enforced by government authority for centuries.

2. Religious liberty. If we regret that our country was one of the last to abolish personal slavery, we may take pride in the fact that we led in the movement for freedom of conscience. There was considerable religious toleration in several colonies even in the seventeenth century, and Rhode Island permitted full religious freedom. During the period of the Revolution, the idea of religious freedom grew along with other democratic principles and came to receive general acceptance. It is not surprising, therefore, that the first provision of the First Amendment of the Constitution is that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is obvious that this restriction does not operate against the states, but the Supreme Court of the United States has held that religious liberty is one of the liberties the Fourteenth Amendment secures against state encroachment. Furthermore, the constitutions of the states regularly carry a declaration for religious liberty.

THE MEANING OF RELIGIOUS LIBERTY. What does religious liberty mean? It means that no church shall be established or directly aided by a government; that an individual may have any religion he prefers and exercise it freely; that he may have no religion at all and strive to "convert" others to it. Some atheists have gone so far as to object to the President's Thanksgiving Proclamation on the grounds that it is contrary to the spirit (but of course not to the letter) of the Constitution. The court in Illinois has held that the religious liberty guaranty in the constitution of that state prohibits the reading of the Bible in the public schools; but such reading, without sectarian comment, is not ordinarily considered contrary to the constitutional provisions for religious freedom. Our ordinary laws calling for Sabbath observance are regularly held valid, as are laws against blasphemy and polygamy, even though a polygamist may be able to show that plurality of wives has sanction in

⁹ It seems however, that a unique performer, for example, a star baseball player, who has agreed to serve a particular person or organization for a specified period and to serve no other during the period, may be forced to live up to his contract to the extent of not serving another during the period agreed upon. But he cannot be forced to "play ball" for a particular person or club. See Burdick, *op. cit.*, pp. 499-500.

his religion. The guiding principle in such cases is that religious liberty does not extend to the point where an individual or group may encroach upon the personal rights of others, nor violate the laws established by society for peace and morality.

Since 1937 we have had a number of interesting and significant cases on the subject of religious liberty. The Jehovah's Witnesses, fortified with stout beliefs and armed with their sectarian literature and phonographs, go about spreading their beliefs on street corners and from door-to-door. They decry any form of religious ceremony, and they refuse to salute the flag because they believe that in doing so they would violate the commandment against bowing down to any "graven image." Numerous local ordinances have been enacted to curb their activities.

A small city in Georgia (the action is almost invariably taken by a small city or town) by ordinance made it a nuisance to distribute literature within the city limits without first obtaining permission of the city manager. A Witness was convicted of violating the ordinance, and the Supreme Court of the United States held the ordinance void as being in violation of the freedom of the press, of speech, and of religion.¹⁰ A Connecticut law required that before money might be solicited for a religious cause the local public welfare council should pass upon the question of whether the cause is religious. Witnesses were convicted of violating this law, but the Supreme Court again decided for the Witnesses, holding that the law was invalid in that it authorized the welfare councils to censor religion.¹¹ Jehovah's Witnesses were expelled from school in a Pennsylvania district because they would not comply with an order of the local school board that all pupils must salute the flag. The Supreme Court, eight-to-one, sustained the school board, holding that cohesive patriotic sentiments and national unity were more important than the protection of the non-conformist views of the Witnesses, and that the school boards were the appropriate authorities to determine the means by which unifying sentiment was to be developed in the schools.¹² But Mr. Justice Stone dissented and, in a later case, three of the justices who had decided with the majority took the unusual step of saying they had been wrong on the flag salute question. On June 22, 1942, Congress decreed that "civilians will always show full respect to the flag when the pledge is given by merely standing at attention." This measure was sponsored by the American Legion, and it is to be expected that state and local authorities will conform to it in their regulations. If they do

¹⁰ *Lovell v. Griffin*, 303 U.S. 444 (1938). On May 3, 1943, the Supreme Court went even further, holding void an ordinance imposing a flat license tax for the privilege of selling literature from door to door, on the ground that, as applied to religious literature, the ordinance invaded the freedom of religion (*Murdock v. Pennsylvania*).

¹¹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹² *Minersville District v. Gobitis*, 310 U.S. 586 (1940).

not, it is quite possible that the Supreme Court may reverse its position on the civilian flag salute requirement.¹³

3. **Freedom of speech and the press.** Although relatively new, one of the most cherished rights of a free people is that of the freedom of speech and of the press. One of the provisions of the First Amendment of the Constitution of the United States is that Congress shall make no law "abridging the freedom of speech, or of the press," and the state constitutions contain similar guaranties against restrictions by state legislatures. The freedom here under discussion must not be interpreted to mean that one is permitted to publish libels and indecent articles or is given the license to send out publications which subvert public morals or injure private reputations. The purpose of these guaranties is to protect and encourage full and free discussion of public questions. The individual is given the right to have his say and relieve his mind and conscience, and the public is given the right to hear him in order to help it make up its mind on public questions. Free speech may lead to grotesque absurdities at times, but certainly without it we would have less assurance that truth was not on the scaffold and wrong not on the throne. The right to speak freely either in praise or blame of a government and its officers creates a wholesome atmosphere and inspires confidence in and respect for government, while a substantial curtailment of this right creates suspicion and distrust and may become a strong contributing factor towards a revolt.

DUE PROCESS OF LAW AND THE FREEDOM OF SPEECH AND THE PRESS. The Fourteenth Amendment of the Constitution denies to any state the right "to deprive any person of life, liberty, or property, without due process of law." The Supreme Court has repeatedly held that the freedom of speech and of the press is a "liberty" protected by the Amendment. Not infrequently one of the forty-eight states or one of the thousands of local government units enacts a statute or ordinance curbing the cherished freedom under discussion, and with encouraging regularity the Supreme Court of the United States strikes down such enactments on the ground that they are contrary to the due process provision of the Fourteenth Amendment.

A Minnesota statute authorized the abatement, as a public nuisance, of any "malicious, scandalous, defamatory" newspaper. A Minneapolis paper ran a series of articles in which the charge was made that certain officers were grossly negligent in performing their duties. For these publications Minnesota authorities proceeded to "abate" the newspaper. The publisher carried an appeal to the Supreme Court of the United States. There it was held that the law under which publishers could be

¹³ Victor Rotnem and F. G. Folsom, Jr., "Recent Restrictions upon Religious Liberty," *Am. Pol. Sci. Rev.*, XXXVI, 1053 (December, 1942).

prohibited from printing newspapers was an infringement of the liberty of the press guaranteed by the Fourteenth Amendment.¹⁴ The decision does not mean that such a publisher shall not be liable, both civilly and criminally, for any abuse of the freedom of the press, but only that the state has no right to prohibit publication. In other words, a newspaper publisher has the right to publish at his own risk, the risk of civil and criminal action for abuse.

A Negro in Georgia advocated, among other things, "mass actions such as demonstrations" and strikes, directed at the ultimate overthrow of capitalism. He was convicted in the courts of that state under an old statute which forbids "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state." The Supreme Court held that the activities of the accused constituted no clear danger to the state and that his conviction under the statute was in violation of due process of law.¹⁵

The case of *Hague v. C.I.O.*¹⁶ has an importance as large as the wide public interest it aroused. Mayor Hague, backed by various conservative forces, was determined to prevent the C.I.O. from getting a foothold in Jersey City. In pursuance of this policy he had caused the City Council to enact an ordinance and his police officers to take action under it which resulted in the closing of meeting halls to C.I.O. organizers, the prohibition of C.I.O. meetings on the streets and in the parks, and in preventing the distribution of C.I.O. papers and pamphlets on the streets. An imposing array of legal talent represented the C.I.O. and other organizations in carrying the issue through the courts. The Supreme Court, by a majority of five to two, decided against Mayor Hague.

FREE SPEECH AND FREE PRESS IN TIME OF WAR. As a nation we are none too proud of our restrictions on these civil liberties during the First World War. In 1917 Congress passed the Espionage Act and followed it the next year with the Sedition Act. Under the sweeping provisions of these laws harmless "crackpots" and those who criticized the government were gathered up along with the dangerous enemies of the Republic and given long prison sentences. On the federal statute books still appears the Espionage Act of 1917 and it is accompanied by the Alien Registration Act of 1940. The title of the latter is incomplete and misleading. It should have some such title as the Alien Registration and Sedition Act, for sec. 2 covers sedition and it makes criminal a speech or publication which might possibly tend to produce results which the law forbids and also criminal membership in a society which may later be found to have subversive purposes. These statutes might be so interpreted that freedom of speech and the press would be as limited as they

¹⁴ *Near v. Minnesota*, 283 U.S. 687 (1931).

¹⁵ *Herndon v. Lowry*, 301 U.S. 342 (1937).

¹⁶ 307 U.S. 496 (1939).

were in 1917-1918, but the Attorney General of the United States has forcefully declared that he will use the authority and influence of his office to prevent "the disgraceful hysteria of witch-hunts, strike breakings, and minority persecutions" of the First World War.¹⁷

Can the federal courts, in particular the Supreme Court, be counted on to maintain civil rights in time of war? The answer seems to be "Yes." Shortly after the close of the last war, Mr. Justice Holmes made this statement, one of the many which place him at the top of the list of jurists: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to *create a clear and present danger* (italics mine) that they will bring about the substantive evils that Congress has a right to prevent."¹⁸ This "clear and present danger" rule was soon abandoned by the majority of the Supreme Court, but it was recently restored. The test of guilt now is approximately this: Did the accused utter or write a statement which is liable to cause direct and serious interference with the conduct of the war? And not: Did he make a statement which by a broad construction of a statute may be labeled criminal? Under this test an individual who urges men not to register for the draft, or industriously circulates defeatist literature to the armed forces, or who systematically opposes the sale of war bonds, or who harbors enemies of the United States would in all probability be sent to prison. On the other hand, the man who in a moment of irritation loudly complains of his income tax bill, or who quietly advises a friend to invest less in war bonds, or who at a dinner party says the Commander-in-Chief of the armed forces of the United States is incompetent will go free. In other words, both the executive department and the courts are interested in the real obstructionists, not in perfectly decent and patriotic people who happen to have "tempers," who make indiscreet chance remarks, or who are just preposterous, "queer," or "nutty."

THE PEOPLE'S PART IN MAINTAINING THE FREEDOM OF SPEECH AND OF THE PRESS. It is apparent from the foregoing discussion that the government is disposed to follow a relatively liberal policy in maintaining the freedom of expression in time of war. If it is suggested that the government should go even further to preserve this freedom, the answer is that it has already gone further than is entirely pleasing to a large segment of the public. The citizens of many communities would classify as a seditious utterance a statement which law-enforcement officers would consider only annoying or irritating; and the same citizens might on their own initiative take such action against a "preacher of sedition" as would call down upon them the gravest rebuke from the Attorney General or

¹⁷ New York *Times Magazine*, Sept. 21, 1941, p. 8, and New York *Times*, Dec. 17, 1941, p. 24. See also R. E. Cushman, "Civil Liberties," *Am. Pol. Sci. Rev.*, XXXVI, 49 (Feb., 1943).

¹⁸ *Schenck v. U.S.* 249 U.S. 47 (1919).

other responsible officials. Citizens who have an itch to serve as detectives would do well to heed the urgent advice of the Department of Justice: that they can serve best by reporting all suspicious cases to officers of the law and let the matter rest at that.

In war and peace the maintenance of freedom of expression is very much the citizen's business. It cannot be maintained by constitutional guaranties alone. With this, as with other rights of man, the spirit of the government and the attitude of the people determine very largely the extent to which such rights will be possessed and enjoyed. Respect for and observance of the rights of a minority, no matter how odious the opinions of that minority may be to the majority, must be maintained if a government is to remain free. The majority must guard against the pernicious assumption that "unsound" opinions deprive their holders of their rights under the constitutions. What is sound and what is unsound? "Time has upset many fighting faiths," declared Justice Holmes. "Ultimate good desired is better reached by free trade in ideas. . . . The best test of truth is the power of the thought to get itself accepted in the competition of the market." He says that the Constitution "is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."¹⁹

4. The right of assembly. The provision of the First Amendment of the Federal Constitution that Congress shall make no law abridging "the right of the people peaceably to assemble, and to petition the government for a redress of grievances," is supplemented by state constitutions imposing the same restrictions upon state legislatures. Obviously, the right of assembly cannot be construed to mean the right of disorderly assembly; although those holding an assembly and the officers who break it up may sometimes disagree as to what constitutes a disorderly assembly. Neither does the right of assembly mean that one may be held at any place. A perfectly orderly group, meeting on a corner of a busy street for the purpose of hearing the Declaration of Independence read, may be dispersed for obstructing the traffic. But it sometimes happens that a "radical" assembly is unfairly and illegally broken up by the police or by enraged citizens.

5. The right of petition. Does the right of petition mean the right to have the petition heard and considered? If this were true, legislative bodies the world over would have little time left for anything else. Dur-

¹⁹ Dissenting in *Abrams v. U.S.*, 250 U.S. 616 (1919).

ing the slavery controversy the question of receiving abolition petitions arose in Congress. In 1836 the House of Representatives resolved that such memorials be tabled without reading. John Quincy Adams, then a veteran member of the House, fought this resolution as unconstitutional, and his persistent efforts finally led to its repeal in 1844. In our day, the constitutional right of petition seems to be satisfied when a petition is officially received.

6. The right to bear arms and its limitations. "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The state constitutions restrict the state authorities as this Second Amendment of the Federal Constitution restricts the national authorities. These rights of the people are not so sweeping that the traffic in and use of small arms ordinarily employed in holdups and private brawls may not be severely restricted by law. The unregulated keeping and bearing of such weapons is not "necessary to the security of a free state." For the security of the individuals in a free state, the carrying of concealed weapons may be prohibited altogether.

7. Jury trial in civil suits. Jury trial for important suits at common law is guaranteed in cases where the federal courts have jurisdiction by the Seventh Amendment of the Constitution of the United States. Although the state constitutions generally give a similar guaranty with regard to common law suits over which state courts have jurisdiction, there are important modifications of the rule in some states. More attention will be given to this point when the law and the courts are under discussion.

III. THE RIGHTS OF PERSONS ACCUSED OF CRIME ²⁰

The rights of an accused person are defined in our constitutions because in less enlightened days such persons were often treated very unfairly. Everyone will agree that an innocent man, when accused of crime, is entitled to all the safeguards against conviction that the law can give him. Furthermore, the most hardened criminal is entitled to fair treatment—to protection against arbitrary conviction and punishment. The law-abiding citizen is sometimes very much out of patience because of the seeming ease with which notorious felons may escape punishment, and he may conclude that the constitutions have done too much in the way of providing protection for such individuals. We should bear in mind, however, that the enemies of society who escape punishment usually escape by some method other than by reliance upon constitutional guaranties. Just how so many felons go unwhipped of justice is a ques-

²⁰ Burdick, *op. cit.*, Ch. XV; Hall, *op. cit.*, Ch. VI; Mathews, *op. cit.*, Ch. XXIII; Willoughby, *op. cit.*, Ch. LV.

tion which we reserve for the chapter on the problem of justice. Our present task is to examine the constitutional rights of the accused.

1. Safeguards for those accused of treason. Treason is defined in the Federal Constitution in order to prevent Congress from passing any sweeping legislation which would classify as traitors those persons who might happen to be merely obstructionists or a source of annoyance to the United States in one way or another. According to the Constitution, "treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." The Constitution goes still further and establishes safeguards for persons who are accused of treason: "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." It is obvious that these provisions afford ample protection against arbitrary treason laws and afford a special protection against conviction for treason.

2. The right to the writ of habeas corpus. "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The Federal Constitution directs this prohibition to the national government. The state constitutions give the people similar protection from the state government. Any person under arrest and confined has the right under this writ to have an immediate hearing before a court in order that the sufficiency of the cause for which he is being held may be examined. If such a person is held by state officers and for an offense presumably falling under state law, he will apply to a state court for the writ. If he is held by national officers or state officers for an offense with which the national government is concerned, he will apply to a federal court for the writ. The writ is issued by the court to the officer who has custody of the prisoner, and it directs the officer to bring the prisoner before the court. The judge will then examine the facts of the case, and hear such testimony and arguments as seem necessary to the establishment of the facts. If it then appears that the prisoner is being detained in violation of law, he will be released; otherwise he will remain a prisoner and await regular trial. The Federal Constitution clearly states that the writ may not be suspended except in cases of rebellion or invasion. Suspension is held to be a legislative power, although Lincoln suspended the writ in certain sections of the country during the Civil War.²¹ Some state constitutions, in order to prevent possible abuse in exercising the power of suspending the writ, prohibit its suspension altogether.

3. The prohibition against bills of attainder. The Federal Constitution prohibits both the national and state governments from passing a

²¹ R. E. Cushman, *Leading Constitutional Decisions* (1940 ed.), pp. 61-63, note.

bill of attainder or *ex post facto* law. The state constitutions regularly duplicate this guaranty with respect to the states. A bill of attainder is a legislative act by which accused persons are declared guilty and punishment is prescribed without judicial trial. It is inconceivable that a legislature in our day would attempt to pass a bill declaring John Doe guilty of robbery and sending him to prison for ten years without judicial trial. But occasionally a legislature might indirectly and unwittingly pass a bill of attainder. For example, a West Virginia law deprived any person who could not take oath that he had never supported the enemies of the United States, of the right to use the courts in certain cases. The Court declared this act to be a bill of attainder and void, in that the offense of bearing arms against the United States was assumed by the legislature and not proved by judicial trial.²²

4. **The prohibition against *ex post facto* laws.** The prohibitions against *ex post facto* laws are more important than those against the bills of attainder, for the reason that many more cases arise under the former. The words *ex post facto* mean "after the fact." The prohibition is against the enactment of any law which makes a deed done before its passage, and innocent at the time, a crime. Furthermore, an act increasing a penalty, or changing a method of trial in such a way as to make conviction more certain, would be *ex post facto* for any person accused of having committed a crime covered by the act on a date prior to its passage.

Examples. These points can be made clear by illustrations. If we assume that selling lottery tickets is no crime in your state in December, a man who sells them in that month could not be convicted under an act passed by the legislature the following January; for, obviously, as applied to him, that law would be "after the fact."²³ In like manner, if a law on the statute books in December fixes a penalty of one year in jail for the selling of such tickets, a law passed in January increasing the penalty to two years would be *ex post facto* as applied to all persons who were being tried for selling lottery tickets in December, or at any other time before the January act was passed. Similarly, any act passed in January altering the rules of evidence in such a way as to require materially less or different testimony for conviction than required in December would be held to be *ex post facto* and invalid as applied to anyone being tried for selling lottery tickets in December, or at any other time prior to the enactment of the new law. Suppose your state law provides that trial in such cases shall be by a jury of twelve persons. A law passed fixing the number at eight would be *ex post facto* for one accused of having com-

²² *Pierce v. Carskadon*, 16 Wall. 234 (1872); Hall, *op. cit.*, p. 92.

²³ But, of course, such a law would be valid against all who committed the crime after its passage.

mitted the crime before its enactment; for it is assumed that eight men will agree to a conviction more readily than twelve.²⁴ But any law which lessens the rigors of criminal justice is valid. Thus, the repeal of a statute under which an individual is held for trial would result in his release.²⁵ It is important to note that the *ex post facto* provision refers only to criminal matters; it does not apply to civil cases.

5. Security against search and seizure. The Fourth Amendment of the Constitution of the United States gives security to one against certain arbitrary acts of the national government and its officers by providing that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The state governments and their officers are under the same restrictions by the terms of the state constitutions. These provisions form the legal basis for the statement that a man's home is his castle. When a warrant is issued for the arrest of an individual, he must be named or described in the warrant. If his papers are to be searched and seized, whether they are at his home, in his office, in the mails, or elsewhere, the warrant must conform to the terms of the constitutions, showing the "probable cause."²⁶ But suppose evidence is obtained by illegal search; may it be used against the accused? The Supreme Court of the United States holds that such evidence is inadmissible, if the accused makes a motion for its return or suppression before the trial.²⁷ Some state courts follow this ruling, but the majority do not.

6. Accused may not be compelled to testify. Under our legal system, no person "shall be compelled in any criminal case to be a witness against himself." The state constitutions carry provisions similar to that just quoted from the Fifth Amendment of the Constitution of the United States. This immunity means that a person cannot be made to testify against himself when he is on trial; that he shall not be compelled, as a witness in any proceedings, to give testimony that may be used later by the government conducting such proceedings, in a criminal prosecution against him; that he cannot be forced to produce private books and papers which might contain evidence against him; and probably that he may not be required to remove his clothing and expose parts of his body or clothing, since such exposure may incriminate him. In Tennessee, it was held that a man on trial could not be compelled to place his naked foot in a pan of mud in order to enable the jury to compare the footprint with that of the man who committed the crime.²⁸

²⁴ Thompson v. Utah, 170 U.S. 343 (1898).

²⁵ For a good summary on *ex post facto* laws see Hall, *op. cit.*, pp. 92 ff.

²⁶ *Ibid.*, p. 103.

²⁷ Weeks v. U.S., 232 U.S. 383 (1914).

²⁸ Stokes v. State, 5 Baxt. 619 (1875).

LIMITATIONS OF THE RIGHT. These rights are guaranteed only to persons who are on trial, or to those whose testimony may lead to their being placed on trial. Thus, an agent of another may not refuse to testify on the grounds that his testimony may render his principal liable to criminal prosecution. Nor may an officer of a corporation successfully base his refusal to give testimony on the plea that the evidence he might give may be used in a criminal case against his corporation. Probably no person may withhold testimony in proceedings in one state because of the possibility of such testimony's being used against him by another state or by the national government. It seems, also, that an individual may not refuse to testify in a national proceeding on the ground that the evidence might incriminate him in a state.²⁹

7. Double jeopardy prohibited. No person shall be subject "for the same offense to be twice put in jeopardy of life or limb," declares the Fifth Amendment of the Federal Constitution. State constitutions invariably carry the same provision. The term "limb" has survived from the days when penal amputations were sometimes ordered. In our time it is liberally interpreted to mean liberty. The clause means not only that one shall not be punished twice for the same offense but also that one may not be tried twice for the same offense. Here, as in practically every clause of our constitutions, many nice questions arise. When is an accused placed in jeopardy? In general, when he has been put on trial before a competent court. However, if the jury cannot agree and is discharged, the double jeopardy plea does not avail against trial by a new jury. Similarly, a jury may be discharged and a new trial ordered, if a juror's official conduct is found to be improper. An accused waives his immunity against double jeopardy when he asks for a retrial or appeals. Waiver is a privilege that rests solely with the accused and, consequently, if he is acquitted in the original trial, the government is blocked from ordering a new trial or making an appeal. It is important to notice that immunity against double jeopardy is granted by the Federal Constitution in federal cases only. In state cases, the accused must look to state constitutions. It happens, therefore, that an individual whose offense violates both state and federal law may be tried by both governments, the double jeopardy plea availing him nothing.³⁰

8. Indictment and trial by jury. Everyone knows something about the right of trial by jury. The Fifth Amendment of the Federal Constitution requires indictment by grand jury in capital or otherwise infamous crimes. This old common law procedure was formerly stipulated in all state constitutions, but the tendency is very definitely away from it today. In its place, many states substitute indictment by an "information" filed by a prosecuting attorney against a person suspected of a crime. In two

²⁹ Hall, *op. cit.*, pp. 99 ff.

³⁰ Mathews, *op. cit.*, pp. 391 ff.

places,³¹ the Federal Constitution states that offenders against federal laws shall have the right of trial by jury. Here again, some states have broken away from the requirements of the common law and modified the jury trial by constitutional provisions. Unless a constitution specifies otherwise, "trial by jury" means trial by a jury of twelve persons, under the direction of a judge, and a unanimous verdict.³² It is clear, of course, that in the indictment, whether by grand jury or information, an individual is formally charged with a crime, and that the function of the trial (or petit) jury is to decide whether he is "guilty as charged" or innocent.

Other rights of persons accused of crime. Constitutions list several other rights of persons accused of crime. One is the right of "speedy and public trial." Speedy trial is just what malefactors do not want. They attempt and often succeed in bringing about delay, knowing well that it is one of the surest methods of eluding justice. Another right of accused persons is that trial shall be in the district where the offense was committed. Where local opinion is such that an accused is not likely to receive a fair trial, a state case may be transferred from one county to another, but the terms of the Federal Constitution are too rigid to permit a federal case to be transferred from one state to another. Constitutions regularly prohibit excessive bails and fines. With respect to bail, the prohibition does not mean that bail must always be allowed. It is never allowed for capital offenses. It means that, if it is allowed, it shall not be out of proportion to the offense and the financial resources of the accused. Fines must be in rough proportion to the offense of which one is convicted. Accompanying the prohibition just mentioned is another against "cruel and unusual punishments." The death sentence as ordinarily carried out does not, of course, fall within the prohibition. The Supreme Court of the United States has held that hard and painful labor in chains for falsification of public records is a cruel punishment within the meaning of the prohibition.³³ This is a rather impressive but not an exhaustive list of the rights of persons accused or convicted of crime. The discussion of "due process of law" in the next section and the later chapters on the courts will give a little more light on the subject.

IV. DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS ³⁴

The Fifth Amendment of the Constitution prohibits the national government from depriving any person "of life, liberty, or property, without

³¹ Art. III, sec. 2, cl. 3, and the Sixth Amendment.

³² Hall, *op. cit.*, pp. 104 ff.

³³ Mathews, *op. cit.*, pp. 394 ff.

³⁴ H. C. Black, *Handbook of American Constitutional Law* (1927 ed.), Chs. XVI, XIX-XX; Burdick, *op. cit.*, XXVIII-XXXIII; Hall, *op. cit.*, Chs. VII-X; Mathews, *op. cit.*, Chs. XXVI-XXXI.

due process of law." The Fourteenth Amendment lays the same prohibition upon the states and adds that they shall not deny to any person within their jurisdiction "the equal protection of the laws." The former prohibition practically includes the latter, since most violations of equal protection also violate due process. The fundamental provision, then, is that respecting due process, a provision which is duplicated in all state constitutions. Both due process and equal protection may be invoked not only by natural persons but by corporations as well. There has been more litigation under this clause of the Federal Constitution than any other. Its significance will appear as we proceed.

The meaning of due process. The term "due process of law" is hoary with age, being accepted as the equivalent of the "law of the land" as used in *Magna Charta*. There is no broader or more fundamental safeguard in our constitutional system than the due process provision. It may be that the breadth and importance of due process, plus an earnest desire not to limit its application, have led the courts to refuse to give a complete definition of its meaning, leaving them with their theory that "the full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise."³⁵ It is possible, however, to give a broad working definition of due process of law. It is this: the due process of law prohibition prevents our governments from taking *arbitrary* action against an individual's life or body, or against his fundamental liberties, or against his property rights. Corporations and other organizations are also protected, except as to "life," by due process of law, particularly by the due process provision of the Fourteenth Amendment. It was made clear in the last section that the freedom of speech and of the press are among the "liberties" protected by due process. Other rights secured by due process include the right to worship, to a fair trial, to contract, to labor, to acquire property, to assemble peaceably, to marry, and to acquire knowledge. It must not be assumed that the due process provision of the Fourteenth Amendment has the effect of requiring the states to observe the federal bill of rights. This is not true. What is true is this: that some of the fundamental rights of persons which due process requires the states to respect happen to be mentioned in the federal bill of rights—the freedom of speech and of the press and the right to counsel when on trial, for example. The due process provision of the Fourteenth Amendment forces the states to observe these individual rights not because they are listed in the federal bill of rights, but because they are essential to due process itself. Indictment by grand jury and trial by jury are demanded of the national government by the federal bill of rights, but due process of the Fourteenth Amendment does not require the states to follow these procedures because they are not essential to a fair trial.

Procedural rights: 1. IN CRIMINAL CASES. In another section of this

³⁵ *Twining v. New Jersey*, 211 U.S. 78 (1908).

chapter, the rights of persons accused of crime were discussed. The due process clauses of the constitutions secure to such persons additional rights. Unlawful arrest on a criminal charge is contrary to due process, for such arrest deprives one of his liberty. A penal statute so vague in its meaning that men with ordinary intelligence could only guess at its application is contrary to due process. A formal and definite accusation must be furnished the person to be tried; he must be given adequate opportunity to defend himself in a court having jurisdiction, that is, the authority to try the case; and he must be allowed adequate counsel for his defense. These are the essential requirements of due process in criminal cases. Due process does not require indictment by grand jury or trial by jury. Nor is due process violated if a person on trial is compelled to give testimony against himself, or if appeal is not allowed. If an accused has the rights just mentioned, and a number of others commonly associated with the rights of accused persons, it is not because due process secures him in them, but because they are given to him by other provisions of the constitutions or by statutes.³⁶

One Hurtado had by the constitution and laws of California, been examined and committed by a magistrate, tried, convicted, and sentenced to be hanged for murder. He attempted to escape the noose by an appeal to the United States Supreme Court, basing his appeal on the ground that his being held for trial, without the ancient procedure of indictment by a grand jury, was about to deprive him of his life without due process of law. The Court took a different view of the matter, holding that, while a method which had been followed for centuries was due process, it did not follow that other and new methods of procedure are not due process. To hold that a judicial practice must have its origin in the dim past in order to meet the requirement of due process of law "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians."³⁷

Although honest and humane individuals supposed that the Fourteenth Amendment would give the Negro civil rights, there have been many occasions when their hopes seem to have been unduly optimistic. Yet due process has often been successfully invoked by members of the colored race. Seven Negro boys—"the Scottsboro boys"—were arrested in Alabama for a capital crime. They were brought into court for trial before they had any counsel and the counsel appointed at the beginning of the trial had no time to prepare for their defense. The Supreme Court of the United States held that such a proceeding does not give the customary right of counsel, and that such right is one of those fundamental liberties which

³⁶ Black, *op. cit.*, pp. 626-628.

³⁷ *Hurtado v. California*, 110 U.S. 516 (1884).

is guaranteed by the due process clause of the Fourteenth Amendment.³⁸ From these illustrations we may conclude that while due process does not guarantee all of the forms of procedure we commonly associate with a criminal trial it does guarantee the essentials of a fair trial.

2. **IN CIVIL CASES.** Due process of law in judicial action in civil cases is held to require a regular proceeding before a court duly authorized to hear the case, and that the parties shall have full hearing in defense or in rebuttal. As in criminal cases, this does not mean the right of a hearing before a jury or other specific rights. Any proceeding which gives notice, fair hearing, and security of essential rights meets the requirements of due process of law.³⁹

3. **OBLIGATION OF ADMINISTRATIVE OFFICERS TO OBSERVE DUE PROCESS.** Administrative officers, as well as judicial officers, are bound to observe the provisions of due process. Revenue and tax commissioners, boards of health, and any other administrative officers may not deprive a person of his property or rights in an arbitrary manner. Due process requires that a proper notice be given to the persons whose rights are concerned and that a fair hearing be had before the proper administrative officials or before a court on appeal. A state board may revoke a license to practice medicine, but the revocation may not be made without giving the doctor due notice and a hearing before the board.⁴⁰

Substantive rights. Up to this point in this section we have discussed due process of law as it is applied in matters of procedure, such as forms of trial. In section I, in those paragraphs relating to freedom of religion, of speech, and of the press, it was shown that the due process clause, as judicially interpreted, protects those liberties not only by preventing arbitrary procedures which would curtail them, but also, and much more important, by striking down statutes which would muzzle the press, gag speakers, and force stout witnesses for Jehovah to "worship idols." We are now to consider the operation of due process of law in relation to other substantive rights, such as the right to make contracts, the right to possess property, and the right to operate private schools.

Due process and the police power. Governments exercise certain powers, rather vaguely termed "police powers," which relate to the safety, health, morals, and general welfare of the public. It is obvious that the field of legislation under such powers is very wide. All laws enacted with regard to these matters must meet the demands of due process of law. It is right here that the great controversies concerning the proper application of due process have been carried on. Here we have to fix a line between the somewhat vague police power of the governments and the not-fully-

³⁸ *Powell v. Alabama*, 287 U.S. 45 (1932).

³⁹ *Black, op. cit.*, pp. 616 ff.

⁴⁰ *Ibid.*, pp. 628 ff.

defined individual rights to liberty and property under the due process clause. Fixing a line between two uncertainties is of necessity a matter of opinion, and the line established is still a boundary fixed by opinion, even though it is laid down by a formal judicial decision. Some concrete cases will illustrate the difficulties involved.

MINIMUM HOUR CASES. Some years ago the state legislature of New York, in the interest of the health, safety, and general welfare of its bakers, passed a law prohibiting their employment for more than sixty hours a week. In the case of *Lochner v. New York*, the Supreme Court of the United States decided, by a five-four majority, "that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee." Thus, five judges decided that the law in question represented abuse rather than a use of the police power. There is some humor in the statement of the Court with regard to there being no fair doubt that the trade of a baker is not unhealthy; for three of its four dissenting judges decided "that the question is one about which there is room for debate and for an honest difference of opinion." Mr. Justice Holmes, the other dissenting judge, differed with the majority still more vigorously: "I think that the word 'liberty' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health."⁴¹

There was a great deal of criticism of the majority opinion of the Court in the *Lochner* case. Some sport was made of the liberty of a laborer, under the due process provision, to contract to work eighteen hours a day if he cared to do so. Three years later, in 1908, the Court decided that an Oregon statute which fixed a ten-hour day for women was a proper exercise of the police power and, therefore, did not arbitrarily deprive women of the liberty to make a contract to work for as many hours a day as they pleased.⁴² In 1917 another Oregon statute was contested before the Supreme Court. This statute, which established the ten-hour day for industry generally, was also sustained by the Court on the ground that it was a fair use of the police power of the state.⁴³

MINIMUM WAGE CASES. The Court was slow to sanction the regulation of wages as a legitimate exercise of the police power. A minimum wage

⁴¹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁴² *Muller v. Oregon*, 208 U.S. 412 (1908).

⁴³ *Bunting v. Oregon*, 243 U.S. 426 (1917).

law for women and children in the District of Columbia was declared by the Supreme Court to be in contravention to the provision of the Fifth Amendment that "no person shall be deprived of life, liberty, or property, without due process of law." The statute required a wage adequate "to supply the necessary cost of living to women workers" and took no account of the reasonable value of the service rendered. This failure to take into consideration the value of the service the Court found particularly objectionable.⁴⁴ In 1933 the New York legislature enacted a minimum wage statute for women and minors and placed in it the provision that the wage should not be above the reasonable value of the service, thus seeking to save the statute from a judicial veto. But in *Morehead v. Tipaldo* ⁴⁵ (1936) the Supreme Court of the United States, in a five-four decision, following its decision in the earlier case, held the law invalid as an unnecessary interference with the liberty of contract guaranteed by the due process clause of the Fourteenth Amendment. Chief Justice Hughes dissented, holding that the objections to the statute for the District of Columbia had been met in the New York law. Justice Stone, in his dissenting opinion, went much further than the Chief Justice. "There is grim irony," he said, "in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together!" On March 29, 1937, the Supreme Court executed a remarkable about-face on minimum wage laws.⁴⁶ Mr. Justice Roberts took his place with the four Justices who had voted to sustain the New York law and the five upheld the validity of a similar law of the State of Washington. The earlier adverse decisions were thus overruled.

THE NEBRASKA SCHOOL LAW. The liberty of individuals and organizations to operate private schools and to determine the subjects to be taught in them, and the liberty to receive instruction in private schools are very important rights which have recently been before the courts. During the First World War and immediately following it, a number of state legislatures, responding to patriotic and Americanization sentiments, passed laws restricting the teaching of foreign languages in private schools. A Mr. Meyer violated such a law in Nebraska, and the courts of that state convicted him for the offense. The Supreme Court of the United States reversed the decision of the Supreme Court of Nebraska, on the grounds that such a statute was an unwarranted interference with the liberty guaranteed by the Fourteenth Amendment and an infringement on the right of teachers and parents in regard to the use of private schools.⁴⁷ This

⁴⁴ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

⁴⁵ 298 U.S. 587.

⁴⁶ *West Hotel Co. v. Parrish*, 300 U.S. 379.

⁴⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923). According to this decision, it seems reasonably certain that if the Tennessee "anti-evolution" law had been made applicable to private as well as public schools it would have been held to be contrary to due process as applied to the former.

decision does not, of course, prohibit the states from legislating on the teaching of foreign languages in the tax-supported schools, just as they may legislate, as in Tennessee, against the teaching of evolution in those schools.

THE OREGON SCHOOL LAW. A law of much wider significance than the Nebraska law was the statute adopted by the people of Oregon by a popular vote in 1922. This statute provided that all children between the ages of eight and sixteen who had not completed the eighth grade should attend the public schools, thus practically abolishing all the private schools at one fell swoop. A Catholic school and a secular military academy contested the constitutionality of the act. The Supreme Court of the United States decided unanimously that the act of the people of Oregon was in violation of the due process clause of the Fourteenth Amendment in that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" and denies to persons engaged in private school management or instruction the liberty of following a vocation "not inherently harmful, but long regarded as useful and meritorious."⁴⁸ This decision must not be understood to deny to the states the right to regulate, in a reasonable manner, all schools, public and private, and to require attendance at some school. The decision does deny to the states a monopoly on education.

The flexibility of due process of law. The one thing that we can be certain about is that the meaning of due process of law is subject to constant reinterpretation and change. Each new generation of judges interprets it and the changing times practically force them to do so. A hundred years ago it was applied only to matters of procedure; its application to substantive law is an American development following the Civil War. Almost never does the Supreme Court adjourn a term without having found a slightly different case calling for its application or without having felt the necessity of giving it a different application to an old type of case. During the past fifteen years, many observers believe that the trend in the meaning of due process of law has been in the direction of extending protection to personal rights as distinct from the rights of property. In particular has the Supreme Court of the United States clearly placed the freedom of speech and of the press, the right of assembly, and similar "human" rights under the protection of due process of law.

Equal protection of the laws. The provision of the Fourteenth Amendment that "no state shall deny to any person within its jurisdiction the equal protection of the laws," as previously stated, is closely associated with the due process clause. The equal protection provision in the Federal Constitution is duplicated by a similar provision against arbitrary class legislation in the constitutions of most of the states. Corporations,

⁴⁸ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

as well as natural persons, enjoy the benefits of equal protection as they do the benefits of due process.

THE MEANING OF THE GUARANTY. The requirement of equal protection of the laws does not mean that all persons and businesses shall be treated alike. It is obvious that regulations for children must differ from those for adults; that feeble-minded and insane adults cannot be accorded the treatment normal individuals receive; that the business of mining needs a set of regulations which differ from those for banking. Equal protection of the laws means that all persons and businesses similarly situated shall be treated alike.⁴⁹ In the interest of the public welfare various classifications can be made, provided they are "based upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."⁵⁰ A few examples of classifications will make this point clear.

Persons on their way to Hot Springs, Arkansas, were so frequently annoyed by "drummers" who swarmed through the trains urging travelers, many of whom were sick, to patronize various physicians, hotels, bath-houses, and the like, that the state legislature passed a law prohibiting the activity of these "drummers" on the trains. Since other drummers were not so restricted, the men to whom the law applied claimed that the classification was unreasonable and denied them the equal protection of the laws. The courts held that the statute was well within the realm of reason; that other drummers were very properly exempted from the prohibition, in view of the fact that they were no source of annoyance to passengers and seldom found opportunity to solicit business on the trains.⁵¹

Missouri passed a law prohibiting producers or sellers to combine, but labor was excepted. The International Harvester Company claimed that this exception of labor from the operation of the law denied the manufacturing concerns equal protection. The Supreme Court of the United States decided that the danger from a monopoly of great producers was real and present, but that there was little danger from a labor monopoly; hence, that the classification was reasonable.⁵² But an antitrust law which excepted farmers and live stock raisers from its provisions was held to be a violation of the equal protection guaranty.⁵³ A comparison of these two cases shows what fine points must frequently be decided by the courts. Since the public also has ideas as to what is reasonable and what is unreasonable, we cannot expect it to receive with meekness the judicial decision in every case.

The chain store tax. Of great interest is the recent movement in several states to place a special tax upon chain stores. By an Indiana law of 1929,

⁴⁹ Hall, *Constitutional Law*, pp. 136 ff.

⁵⁰ Gulf, C. and S. F. Ry. Co. v. Ellis, 165 U.S. 150 (1897).

⁵¹ Williams v. Arkansas, 217 U.S. 79 (1910).

⁵² International Harvester Company v. Missouri, 234 U.S. 199 (1914).

⁵³ Connolly v. Union Sewer Pipe Company, 184 U.S. 540 (1902).

the first store pays \$3 per year; the next four, \$10 each; the next five, \$15 each; the next ten, \$20 each; and all above that, \$25 each. An owner of 225 chain stores alleged he was being denied the equal protection of the laws, in that his tax amounted to \$5,443, while the same number of individual stores paid only \$675. In a five-four decision the Supreme Court held that "the fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction. . . . The statute treats upon a similar basis all owners of chain stores. . . . This is all the Constitution requires."⁵⁴

LAWS MUST BE FAIRLY APPLIED TO PERSONS IN THE SAME CLASS. It is not enough that a classification law be reasonable and founded on a sound principle of government policy. Such laws must be reasonably and fairly enforced in order to satisfy the requirements of equal protection. Some fifty years ago, the City of San Francisco passed an ordinance prohibiting the operation of laundries in frame buildings without a permit from a city inspector. This was a perfectly valid ordinance by its terms. There is clearly more danger of fire in such buildings than there is in buildings of brick and stone. But the city inspector gave natives permits to operate laundries in the frame buildings and refused to give permits to Chinese. Yick Wo, acting for himself and other Chinese, accepting the advice of good counsel, went to court with the plea that the enforcement of the ordinance amounted to a denial of his constitutional right to the equal protection of the laws. The Supreme Court of the United States took the same view, expressed in this language: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."⁵⁵

The Negro and equal protection. The requirement of the Constitution means that persons shall be given equality of rights under the laws, not identity of rights. It follows then that, while state and local governments may not exclude Negroes from the public schools, they may force them to attend schools established especially for Negroes. A law requiring railway companies to provide separate, but equal, accommodations for the white and colored races meets the demands of the "equal protection of the laws" provision. Members of the Negro race ordinarily make no complaint against the separate accommodation practice, but they often bitterly complain that the accommodations furnished are not equal. Congressman Mitchell, a Negro representing a Chicago district, was traveling from Chicago to Hot Springs, Arkansas, on a ticket which entitled him to

⁵⁴ State Board of Tax Commissioners of Indiana v. Jackson, 283 U.S. 527 (1931).

⁵⁵ Yick v. Hopkins, 118 U.S. 356 (1885).

Pullman accommodations. Upon reaching the Arkansas border he was compelled to leave the Pullman and ride in a day coach reserved for members of his race. All of this was in compliance with the Arkansas segregation law. The railroad was willing to refund the difference in fare, and, in fact, did let colored passengers occupy drawing-room space at regular Pullman fare, if such space was available. The railroad showed that very few Negroes traveled by Pullman, and claimed that it was unreasonable to require it to provide separate and equal Pullman accommodations for them. Nevertheless, the Supreme Court of the United States was unanimous in holding that Mitchell was a victim of discrimination and entitled to relief.⁵⁶ It is true that Mitchell presented his case under a federal law, the Interstate Commerce Act, but there is no doubt that the decision would have been the same had he sought his relief under the "equal protection" clause against the discriminatory Arkansas statute. Segregation laws are valid if both races are given equal accommodations, and not otherwise. Fair segregation laws are supposed to bring about better relations between the races, and the courts hold them to be legitimate under the police power.

Segregation in cities usually works out naturally or by private arrangement, but occasionally a city will legislate. An ordinance of the city of Louisville which provided that Negroes should not occupy a residence in a block in which the greater number of houses were occupied by white people was declared void because, in the opinion of the Court, it could not be sustained under the police power, and unreasonably interfered with the liberty of property ownership and occupancy.⁵⁷ But private citizens in a block may make a valid agreement not to sell property to colored persons, since the Fourteenth Amendment is not addressed to individuals but to governments.

In 1935 the Negro received considerable comfort from a Supreme Court decision. Our discussion of due process brought out the fact that in the first "Scottsboro case" the Negroes were held to have been denied due process of law because they were not given a fair opportunity to retain counsel. After this decision they were again tried and convicted. They again appealed to the Supreme Court, this time on the ground that Negroes had been systematically excluded from service on both the grand jury and the trial jury. The Court examined the evidence and found that Alabama courts in the counties having jurisdiction of the accused Negroes followed the unvarying practice of excluding members of that race from jury service. This practice was declared to be in violation of the equal protection clause of the Fourteenth Amendment.⁵⁸ Of course, no one would be so

⁵⁶ *Mitchell v. United States*, 313 U.S. 80 (1941).

⁵⁷ *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁵⁸ *Norris v. Alabama*, 294 U.S. 587 (1935).

foolish as to say that court decisions of this kind can put the Negro on the same practical footing as the white man in defending his rights. Nothing less than the extinction of race prejudice will bring about that result.

Due process and equal protection in eminent domain. One of the powers of sovereignty is that of eminent domain, that is, the right to take private property for public use. But this power must be exercised under constitutional restraint. The Fifth Amendment of the Federal Constitution supplements the due process provision with the declaration that the national government shall not take private property for public use without just compensation. The state constitutions limit state governments in the same way, and sometimes impose more detailed limitations. The due process and equal protection clauses of the Fourteenth Amendment are further limitations on the power of the states to exercise the power of eminent domain.

The general principles which are followed for the protection of property in eminent domain cases can be stated in a few sentences. First, private property may be taken only by a government or by a corporation acting under government authority. Second, the purpose for which property is taken must be public—a matter for judicial determination. Third, the property which may be taken is not confined to land; franchises and similar property rights may be taken. Fourth, property is said to be "taken" when its owner is deprived of it entirely or of the ordinary use of it. Fifth, when property is to be taken, the owner is entitled to payment for damages in money, the amount to be determined by an impartial tribunal, according to the just and fair value of the property taken.⁵⁹

V. THE PROTECTION OF CONTRACTS ⁶⁰

Liberty of contract not unlimited. We have learned that one of the liberties protected by the due process provisions of our constitutions is the freedom of contract. "Every citizen has a right freely to contract for the price of his labor, services, or property." But this right is subject to government regulation in the interest of the public. The government "may restrain all engaged in any employment from any contract in the course of that employment which is against public policy." An attorney charged the Widow Julia Johnson more than ten dollars, contrary to a statute of Congress, for assisting her in presenting her claims to a pension. When he was convicted for violating the law, he appealed his case, arguing that the statute was unconstitutional in that it interfered with his freedom to contract for his professional services. The Court held the statute valid on the grounds that it was good public policy to protect pensioners from extortionate charges by lawyers and agents.⁶¹ We should bear in mind,

⁵⁹ Black, *op. cit.*, pp. 455 ff.

⁶⁰ Hall, *op. cit.*, Ch. XI; Mathews, *op. cit.*, Ch. XXV; Willoughby, *op. cit.*, Ch. LIX.

⁶¹ Frisbie v. U.S., 157 U.S. 160 (1895).

then, that while the liberty of contract is given very broad protection by the due process clause, it is subject to reasonable limitations for the public good.

States prohibited from impairing the obligation of contracts. The Constitution of the United States prohibits the states from passing any law "impairing the obligation of contracts." The same prohibition is addressed to the legislatures by many state constitutions. The Congress of the United States is not so restricted, but an act of that body which played havoc with contracts would be contrary to the due process clause of the Fifth Amendment. However, the abrogation of the "gold clause" in private contracts was held valid, one of the reasons being that the act was an exercise of the paramount power of Congress to regulate the currency.⁶²

TYPES OF ENGAGEMENTS WHICH CONSTITUTE CONTRACTS. What is a contract within the meaning of the constitutional provision prohibiting impairment by the states? John Doe borrows a thousand dollars from Richard Roe and agrees to pay back the money on a certain date, with interest at eight per cent. This is a clear case of contract. Some other cases are not so clear. The state legislature of Georgia granted some land to one Gunn. Because of his alleged fraud in securing the grant, the legislature tried to rescind the grant. The Supreme Court of the United States held that the grant was a contract, and that the state could not reassert title without impairing the obligation of that contract.⁶³ When a state issues a charter for a business corporation, it has made a contract, although it is not easy for the ordinary person to understand just why such charters should be classed as contracts. Marriage is not a contract, but a status. Laws regulating marriage relationships do not, therefore, run the risk of impairing the obligation of contracts. Gratuitous promises to give another a thousand dollars or a car are not contracts; for valid contracts must be entered into for a consideration. Oral agreements for important transactions are usually not enforceable as contracts; for important agreements are required to be in writing in order to be enforceable.⁶⁴

ILLUSTRATIONS OF LAWS WHICH VIOLATE THE CONTRACT CLAUSE. Now that some idea of what constitutes a contract has been given, we shall note the operation of the clause which prohibits the impairment of contract obligations. Let us return to John Doe, who borrowed a thousand dollars from Richard Roe and agreed to pay interest at the rate of eight per cent. Suppose the state legislature later makes a law which fixes the interest rate at seven per cent. This law would impair the rights of Richard Roe under his contract, and it would be declared inapplicable to his case. Such a

⁶² 294 U.S. 240 (1935).

⁶³ Fletcher v. Peck, 6 Cranch 87 (1810).

⁶⁴ Hall, *op. cit.*, pp. 221 ff.

law would, of course, properly apply to similar contracts made after its passage.

If the debtor does not pay the creditor, the latter may go to court and have the debtor's property sold to satisfy the debt. Suppose after the contract is made the state legislature passes a law providing that no debtor's property shall be sold for less than two thirds of its appraised value. This law will impair the creditor's rights under the existing contract, as it will make it more difficult to sell the debtor's property and, therefore, more difficult for the creditor to collect his money.⁶⁵

Corporations and the contract clause. What of the charter privileges which, as we have just learned, are contracts? The rights of corporations under such contracts are secure against impairment also, but subject to two important limitations. One of these limitations is that any privilege which has not been expressly granted by a government shall be held to have been denied. The leading case in which this method of interpretation was applied arose in Massachusetts a century ago. The state legislature had given a company the right to build a toll bridge across the Charles River, with the privilege of collecting the tolls for seventy years. Some years later the legislature gave another company the privilege of building a toll bridge a short distance from where the first bridge was located, this bridge to become free in six years. The first company complained that this free bridge would ruin its business and that the grant of a charter to build a bridge and collect tolls was an implied contract that the state would not thereafter cause to be erected a competing or free bridge. The Court held that, since the state has not expressly given the original company a monopoly, no such monopoly could be implied.⁶⁶

The second limitation on the charter privileges of corporations is found in the ruling of the courts that a legislature cannot, even by express agreement, contract away its governing power in important matters. For instance, when Mississippi forbade lotteries, the law was held valid even when applied to a company which had just been chartered by the state to engage in the lottery business for twenty-five years, the basis of the decision being that the state could not contract away its power to regulate public morals.⁶⁷ The same rule is applied with regard to the public health, public safety, and, seemingly, to other important matters touching the public welfare.⁶⁸

⁶⁵ *Bronson v. Kinzie*, 1 Howard 311 (1843).

⁶⁶ *Charles River Bridge v. Warren Bridge*, 11 Peters 420 (1837).

⁶⁷ *Stone v. Mississippi*, 101 U.S. 814 (1879).

⁶⁸ *Hall, op. cit.*, pp. 241 ff. Another method by which the states commonly limit the operation of corporate charters is through provisions in the state constitutions and laws that the states shall have the power to alter or repeal such charters at any time. Such provisions are, of course, a part of the contract. Corporations cannot, therefore, claim that contracts are impaired when the states choose to alter or amend their charters. *Ibid.*, p. 244.

CONCLUSION

Certain conclusions are fairly obvious from this survey of individual rights. The first is that there are practically no absolute rights. Free speech, religious liberty, the freedom of contract, to name only a few, have their limitations. Absolute rights could be associated only with anarchy.

A second point for reflection is that property rights have often been better safeguarded than other rights. At times, free discussion has been allowed to operate only in very narrow limits, and the principle of the freedom of contract has sometimes led to the annulment of needed social legislation. It is encouraging to report that this charge cannot now be maintained against the Supreme Court of the United States.

In the third place, one is struck with the extent to which the federal courts protect personal and property rights through their power to review acts of legislative bodies, particularly acts of state legislatures, which are alleged to be in violation of prohibitions laid upon state authority by the Federal Constitution.

Last, and most important of all, fine phrases in constitutions are not necessarily bulwarks of civil liberty, nor are they its only safeguards. Englishmen have their civil liberties without such rigid paragraphs of security. The grandest themes of liberty running through the constitutions of some countries leave the man and the citizen uncertain about his freedom. The only safeguards of liberty in the long run are in the spirit of the government and the people back of that government. If the people are intolerant and have no regard for the constitutional rights of those whose thought, speech, and conduct they happen not to approve, the officers of the government will respond more or less to the popular influence, and civil liberties will be seriously impaired. It is then that persons will be gagged, the press muzzled, illegal searches and seizures made, and so on, civil liberties guaranties to the contrary notwithstanding. We cannot overemphasize the fact that the essential foundations of liberty can be maintained only by a public opinion which zealously guards them.

READING LIST

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Citizenship and the Suffrage

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In the chapter on "Civil Rights," our attention was directed to the rights of persons, including the rights of artificial persons or corporations. This chapter deals with citizenship and its privileges. Although it was generally understood from the beginning of our national history that all persons (except Negroes and Indians) born in the United States were citizens, the Fourteenth Amendment gives citizenship a definite constitutional basis in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

I. NATIVE-BORN CITIZENS ¹

Who are native-born citizens? Everyone knows that the main purpose of the provision just quoted was to give the Negroes citizenship. But it does more than that. It declares that *all* persons born in the United States, and subject to the jurisdiction thereof, are citizens. Wong Kim Ark was born in California of alien Chinese parents. As an adult he went to China on a temporary visit. When he returned to the United States, the Collector of the Port of San Francisco denied him admission on the ground that such admission would be in violation of the Chinese exclusion law. The Supreme Court of the United States held that the citizenship of the child did not follow that of the parents, and that Wong Kim Ark, having been born in California, was a native-born American citizen and entitled to admission to his country.²

Persons born in the United States who are not citizens. Persons born in the United States are not citizens if they are not "subject to the jurisdiction." By long-established rules of international law, several classes of persons are not subject to the jurisdiction. Diplomatic officials and executive officers of foreign governments are not under the jurisdiction of the United States, although they may be in the United States; conse-

¹ Luella Gettys, *The Law of Citizenship in the United States* (1934); C. C. Hyde, "The Nationality Act of 1940," *Am. Journal of International Law*, XXXV, 314 (April, 1941).

² *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). This is the Anglo-American doctrine, known as *jus soli*. It is adhered to by about a third of the nations. Other countries hold that a child's citizenship is in the country to which his father owes allegiance. This is the principle of *jus sanguinis*. We should add, however, that few countries, not even the United States and Great Britain, adhere exclusively to either principle.

quently, their children who are born in the United States are not American citizens, but citizens of the countries their fathers represent. Public vessels, usually war vessels, are always under the jurisdiction of the country which owns them; hence, children born on such ships in the territorial waters of the United States are not American citizens. Another exception is found in the case of children born to enemy families in hostile occupation of American territory.

Persons born abroad who are citizens at birth. The United States has always classed as citizens children born abroad of American parents, but in the Nationality Act of 1940 this government gives a broad extension of the privilege. Persons declared to have American citizenship at birth include (1) any person born outside the United States and its outlying possessions of parents *both* of whom are citizens of the United States and *one* of whom has resided in the United States or one of its outlying possessions prior to the birth of such person; (2) any person born outside the United States and its outlying possessions of parents *one* of whom is a citizen of the United States who, prior to the birth of such person, has had *ten years'* residence in the United States or one of its outlying possessions, at least *five years* of which were after attaining the age of sixteen years. But, in order to retain citizenship acquired from the one parent, a person must reside in the United States or one of its possessions for a period of *five years* between the ages of thirteen and twenty-one.

RECIPROCITY. Of course this rule regarding the citizenship of children born abroad of American parents must operate both ways. Consequently if the country to which aliens in the United States owe allegiance claims that the citizenship of the children of such aliens must follow that of the parents, our government does not claim that such children must be American citizens. Here is a concrete case. Hans is born in the United States of Danish parents. By the Fourteenth Amendment he is a *native-born* citizen of the United States. If he goes to Denmark, that government may claim him as a *natural-born* citizen and our government admits the claim. Such persons are said to have dual nationality. Obviously, this flexible rule serves a very practical purpose in this day when so many citizens reside in foreign lands.

Subject to the exceptions just noted, all persons born in the United States and abroad of American parents are citizens. Women, as well as men, are citizens and have been all through our history. Children are citizens. The baby's citizenship dates from the time that he first serves as the family alarm clock. A very common error is the assumption that persons are not citizens until they reach the voting age.

II. IMMIGRATION AND NATURALIZATION ³

Perhaps strict logic would require us to proceed at once from our review of citizenship by birth to citizenship by naturalization. But since immigration must come before naturalization, it seems practical to give it precedence in the discussion.

American immigration policy. A brief consideration of our immigration policy is in order. It was most liberal until after the Civil War. We needed immigrants to help develop our vast resources and, besides, we had a feeling of pride in being the refuge of peoples held down by the social structure and political "despotism" of the Old World. The first restrictive legislation came in 1882, when Congress denied admission to paupers, lunatics, and Chinese coolies. Agitation for greater restriction, largely promoted by labor organizations, has since been almost unabated, and, in recent years, very successful. Diseased persons, criminals, anarchists, and aliens objectionable for various other reasons have been placed on the ineligible list. In 1917 persons who could not read some language were debarred. Fearing a flood of immigrants following the First World War, Congress (1921) restricted the number which might enter annually from any country to three per cent of the number of persons of that nationality who resided in the United States in 1910, and by an act of 1924 changed the number to two per cent of those residing in the country in 1890.

A policy which was announced as permanent, but which is not altogether satisfactory, went into effect in 1929. By this law, we admit from certain countries, chiefly European, 154,000 immigrants per annum. The proportion of this 154,000 which may be admitted from any such country is determined by the proportion in which that country has contributed to our national stock. Thus, since the greater part of our population traces its ancestry back to the British Isles, those Islands have the lion's share, about 83,000. Since Germany contributed about one sixth of our national stock, about 26,000 Germans may migrate to the United States each year. This immigration system is known as the "national origins plan." It does not apply to Orientals; they are excluded, with the exception of certain professional classes and students. It does not apply to American peoples—Canadians, Mexicans, Cubans, and others; they may enter freely. Broadly speaking, our present immigration policy amounts to this: Asiatics are excluded, Europeans are placed on a quota basis, and peoples of the American countries are admitted without numerical restriction. Of course, illiterates, anarchists, criminals, and individuals who are objectionable on various other grounds are denied admission regardless of the country of origin.

³ L. Gettys, *The Law of Citizenship in the U.S.* (1934), Chs. III-VII; Willoughby, *op. cit.*, Chs. XIX-XXVIII; L. Adamic, "The Land of Promise," *Harper's*, October, 1931, pp. 618-628; Adamic, "Aliens and Alien-Baiters," *Harper's*, November, 1936, pp. 561-574; Hyde, *op. cit.*

The result of these changes in our immigration policy is shown by the fact that less than 250,000 immigrants, including those from the non-quota American countries, were admitted in the fiscal year ending June 30, 1930, whereas prior to the First World War, before percentage restrictions were imposed, nearly a million were admitted annually. The Second World War reduced immigration almost to a trickle.

Further immigration restriction. Many citizens, particularly those in the ranks of labor, are of the opinion that the present system is not sufficiently restrictive. There is considerable agitation in the West and Southwest against the unrestricted immigration of cheap Mexican labor. There is also a determined movement, national in scope, to reduce the number of aliens from the European countries, a movement which had considerable backing in Congress in the spring of 1931, although no restrictive measure was enacted. It seems that one may safely predict that, while the details of our immigration laws will be changed from time to time, the tendency will continue in the direction of restriction, with an added emphasis in times of economic depression. We should add that the problem solves itself to some extent. At least it can be said that, since 1931, almost as many aliens have left the United States as have been admitted.

Administration of immigration laws. The immigration laws are administered by the Immigration and Naturalization Service of the Department of Justice. Its two main functions in this connection are to determine the right of aliens to enter the United States and to deport those who have entered illegally. Formerly, aliens seeking admission were examined only at the ports of entry and were turned back in great numbers as being ineligible. This system often brought great hardship to rejected aliens, and it was not a very businesslike method. In recent years, we have followed the plan of sending immigration inspectors abroad, who interview prospective immigrants in their own country, advise them, and determine in a preliminary way whether they will be admitted to the United States. As a consequence of this enlightened policy, only about five immigrants out of a thousand from overseas are now turned back at our ports of entry. Every year thousands of aliens are deported. In 1941 the number was 4,407, including 1,468 who had entered surreptitiously, 1,200 criminals, and 703 who had been previously debarred or deported.⁴ The number deported does not tell the full story, for 6,531 who had been adjudged deportable were allowed to depart at their own expense and without a warrant of deportation. Back in the 'twenties and early 'thirties, when the immigration laws were administered by the Department of Labor, the authorities were often criticized for acting arbitrarily in deportation proceedings. Particularly did this charge have justification in the period immediately following the First World War. It is fair to add, however, that,

⁴ *Report of the Attorney General, 1941, p. 257.*

beginning with 1933, the Labor Department followed a much more restrained policy and that its successor in administering the immigration laws, the Department of Justice, shows every desire to pursue a humane policy.

The Alien Registration Act of 1940. In the midst of a world upheaval Congress enacted this law as a means of protecting the American people from "fifth columnists," saboteurs, and other subversive elements. Its administration is in the hands of the Alien Registration Division of the Immigration and Naturalization Service. The act requires the registration of all aliens in the United States and the registration of all aliens entering the country, the registration of the latter to take place at American consulates abroad at which aliens obtain their entry visas (permits). The law requires also that all aliens above the age of fourteen be fingerprinted. On its face the statute seems harsh, contrary to American traditions; but it would be easy to prove that it is highly desirable, and it is a matter of pride to Americans that it has been administered in a friendly spirit. It should be recorded also that the law serves not only as a protection to the United States, but also to the aliens themselves. For one thing, registration establishes proof of entry to the United States, and for another, it might save an innocent person from conviction of crime.

Naturalization. Now we are ready to consider the process of naturalization. Groups of aliens, without any affirmative act on their part, may be collectively naturalized by treaties and acts of Congress; or the individual alien, upon his own initiative, may be admitted to citizenship under the ordinary naturalization laws.

1. **COLLECTIVE NATURALIZATION.** The first method is commonly employed in bestowing citizenship upon "subjects" or "nationals" who reside in territory newly acquired by the United States. Prior to 1898 it was our practice to naturalize the inhabitants of ceded territories collectively at the time of cession or shortly thereafter. But since 1898, when we began acquiring territory inhabited by peoples unfamiliar with our political institutions, we have pursued a more cautious policy. Several islands were added to our domain on the date mentioned. In 1900 Hawaiians were made citizens of the United States; but it was not until 1917 that Porto Ricans were accorded that privilege. As for the Filipinos, they are still not citizens of the United States, although they are "nationals" of the United States and entitled to about the same protection by its government as are citizens. The annexation of the Virgin Islands in 1917 was followed ten years later by the collective naturalization of their inhabitants as citizens of the United States.

2. **INDIVIDUAL NATURALIZATION.** When we speak of naturalization, we generally have in mind the process by which aliens may obtain citizenship individually. The privilege of becoming a naturalized citizen was first provided for by act of Congress in 1790. Congress has enacted new legis-

lation on the subject from time to time, and only very recently passed a very comprehensive measure, the Nationality Act of 1940. Our discussion of naturalization is based primarily upon this act.⁵

Persons eligible for naturalization. Until 1870 only "free" white persons were eligible for citizenship by naturalization, but at that time persons of African nativity or descent were made eligible. To this list the act of 1940 adds "descendants of races indigenous to the Western Hemisphere." Ineligible are the Chinese, Japanese, Hindus even of pure race and the highest cast, and all other Orientals. Ineligible also are those of mixed blood of such races and peoples. An exception is made for native-born Filipinos who have served honorably in the armed forces of the United States, the act of 1940 expressly declaring them eligible for citizenship. No person is eligible for naturalization who cannot speak English; who advocates opposition to organized government; who would overthrow by violence the Government of the United States; or who is in any way affiliated with organizations which advocate such opposition to government. It is not without interest that an alien enemy may be naturalized if he has declared his intention to become a citizen of the United States not less than two years prior to the declaration of war.

Naturalization procedure. Naturalization has always been under the jurisdiction of the district courts of the United States and state courts. For many years the process was often a scandal, particularly in the metropolitan areas. Since citizenship has always been a common, although not a universal, requirement for voting, the political organizations were very active in securing the naturalization of aliens. This was accomplished by outright fraud in some cases, but a more common method was to rush through hundreds of aliens just prior to an election. At such times, the courts would administer the naturalization law in a most perfunctory way, sometimes operating at the rate of a naturalization a minute. Under such conditions, many persons were admitted to citizenship who were not entitled to it. The law of 1906 corrected some of these abuses and the designation of examiners to assist the courts with naturalization cases helped to prevent others. The Nationality Act of 1940 marks a still further advance toward a better administered system.

A person seeking naturalization must have reached the age of eighteen. His first step toward his goal is to sign a declaration of intention to become a citizen of the United States. This declaration, which contains eighteen items, should show that he has the qualifications which, with the expiration of time, will make him eligible for citizenship. Not less than two and not more than seven years after he has filed the declaration of intention, and not less than five years after his arrival in the United States, he may file his petition for naturalization. This petition must describe the

⁵ 54 Stat. 1137.

applicant, give complete information concerning his former residence and his residence in the United States, be accompanied by a certificate of his arrival in this country, state that he is "well disposed to the good order and happiness of the United States," and contain various other facts and declarations. The petition must be accompanied by the affidavits of at least two credible witnesses, citizens of the United States, stating that they have known the petitioner during the six months preceding the filing of the petition and that he is a person of good moral character and attached to the principles of the Constitution of the United States.

Upon receipt of the petition for naturalization, an officer of the Immigration and Naturalization Service of the United States Department of Justice conducts hearings on it. The examiner is authorized to take testimony concerning any matter touching the admissibility of the petitioner for naturalization, to subpoena witnesses, and to administer oaths. The examiner makes his report to a court, recommending that the petition be granted, or denied, or continued, giving reasons. The final hearing on the petition is held by a judge in open court, and the judge makes the final order on the petition. If the petition is approved the petitioner is then permitted to take the oath of allegiance to the United States. The final ceremony of admission to citizenship has not always been such as to impress the new citizens. It was often done in haste and without dignity. "When do I get to be a citizen?" asked a bewildered petitioner who was told to go. "You are a citizen now, you dope," replied an attendant. These conditions have been improved somewhat in recent years, and they should be greatly improved in all courts. The ceremony of becoming a citizen like the ceremony of marriage, should be solemn, dignified, and at the same time radiate cheering prospects of a new life. It is gratifying to report that many local communities now work with the Naturalization Service in organizing appropriate ceremonies for those being inducted into citizenship. In some communities rather elaborate and effective annual celebrations are held for foreign-born who became citizens during the preceding year.

Education for citizenship. Infinitely more significant than any ceremony of induction is the education of the applicant for citizenship. Long conscious of the gross inadequacy of the training given most applicants (often they had none), both the government and public-spirited citizens have started to do something about it. The President has approved a National Citizenship Education Program, a logical sequence of the registration of nearly five million non-citizens of this country. The Nationality Act of 1940 authorizes the Commissioner of Immigration and Naturalization to promote instruction and training in the citizenship responsibilities of applicants. Under the authority of this act the Commissioner has prepared and distributed citizenship textbooks, supplied the public schools

with names of candidates for naturalization, obtained the aid of state and local authorities in promoting the program of education, and otherwise facilitated the instruction of future citizens. No plan of this kind will bring about important results unless local non-paid citizens take an active interest in it, and it is encouraging that educational authorities, teachers, and civic and patriotic organizations are sharing in its development.

Derivative citizenship. Formerly, alien women who might lawfully become naturalized, automatically became American citizens upon marriage to such citizens. This is no longer possible, but citizenship by naturalization is made easy for such persons. In 1922 Congress authorized women of a race eligible for naturalization who married American citizens to obtain citizenship after one year of residence in the United States. Later statutes modified the plan slightly and extended essentially the same privilege to aliens who married American women. Without going into the details of the latest legislation on the subject, the Nationality Act of 1940, it may be said that any alien (male or female) who marries an American citizen may within a period ranging from one to three years, depending upon circumstances, become a naturalized citizen. Formerly, children born outside of the United States acquired citizenship through the naturalization of their fathers but not through the naturalization of their mothers. Under the present law, alien children under the age of eighteen and residing in the United States become American citizens upon the naturalization of both parents, or upon the naturalization of the surviving parent or the parent having legal custody of the child. The law provides also that a child born outside of the United States, one of whose parents is a citizen at the time naturalization is sought for the child (the child being under eighteen), may be naturalized without a declaration of intention, provided he is residing in the United States with the citizen parent.

Denaturalization. Disloyalty on the part of certain naturalized citizens in time of war lends interest to the fact that the government may cancel the certificates of citizenship obtained by illegal or fraudulent means, and since 1906 it has provided for it by statute. Under the law a certificate may be canceled on the ground that it was illegally procured if the applicant did not reside continuously in the United States for a period of five years next preceding his petition, if he is of a race disqualified for citizenship, or on various other grounds. An individual who renounces allegiance to his old country, takes his oath as an American citizen, and then shows a preference for the land of his origin over the land of his adoption is likely to find himself deprived of his citizenship in the latter on the ground that he obtained it by fraudulent means, that he made mental reservations when he took the oath of allegiance to the United States. Thus, a native of Germany, naturalized in the United States in 1882, who made repeated statements to the effect that he did not wish to see the United States victorious in the First World War was deprived of his citi-

zenship. At that time this policy was followed in a number of similar cases, and, since our entrance into the Second World War it has been followed in scores of cases.⁶

Expatriation. Despite the fact that civilized nations have for centuries extended the privilege of naturalization, the right of an individual to expatriate himself, to renounce his allegiance to a country without its government's consent and swear exclusive allegiance to another country, is of relatively recent origin. One might become a citizen of another country, but the land of his first allegiance might still claim him as her own and, what is more, make matters distinctly unpleasant for him if he should happen to set foot again in her territory. During the nineteenth century the United States granted citizenship to many Europeans who came to her shores, and these "citizens by adoption," upon the occasion of a visit to the old homeland, frequently discovered that their rights as American citizens were not recognized by the government of their native land. Against this disregard of the rights of her naturalized citizens the United States made protests, sometimes vigorous and effective, but it was not until 1868 that Congress by law proclaimed the right of an individual to expatriate himself. As the matter now stands the United States asserts the right of an alien to renounce his allegiance to his native land, with or without the consent of its government, and by the same token it concedes the right of an American citizen to change his allegiance from the United States to another country. Not only does the United States support expatriation as the right of an individual, but it also designates a number of circumstances, such as voting in a foreign election, under which a citizen of the United States forfeits any claim he may have to such citizenship. (In respect to special conditions under which naturalized citizens forfeit claim as citizens, see paragraphs 2 and 3 of the next section.)

III. THE PRIVILEGES OF CITIZENS

Privileges of naturalized citizens limited: 1. INELIGIBLE FOR THE PRESIDENCY. The naturalized citizen has the same privileges as the native citizen, with three exceptions. The first exception is that he is not eligible for the presidency of the United States. This constitutional provision has deprived a few of our foremost naturalized citizens, a number of whom have been governors and members of Congress, of a chance to reach the White House.

2. NO ASSURANCE OF PROTECTION AGAINST CLAIMS OF FORMER COUNTRY FOR MILITARY SERVICE. The second exception is found in the somewhat limited protection we give naturalized citizens when on visits to their old countries. Our government is often unable to prevent such citizens from

⁶ Lawrence Preuss, "Denaturalization on the Ground of Disloyalty," *Am. Pol. Sci. Rev.*, XXXVI, 701 (August, 1942).

being forced into the military service of the country of former allegiance or to prevent their being punished for an earlier evasion of military service. Under naturalization treaties with some countries, fairly satisfactory arrangements have been made respecting military obligations; but in those countries with which no such treaties have been made naturalized citizens are advised that they cannot rely with assurance upon the protective arm of the United States; that before visiting such countries they should inquire of the appropriate authorities thereof whether they will be held for military service. Native-born American citizens whose parents are unnaturalized, since they may also be considered citizens of the country of their parents' origin, are similarly advised to ascertain their status before visiting the parents' homeland. Under the Nationality Law of 1940, a citizen who was born in the United States is presumed to have forfeited any claim to the protection of the United States from enforced military service in a foreign country, if he or either parent has ever been a citizen of that country, and if he remains in that country for six months or longer.

3. **LOSS OF CITIZENSHIP THROUGH RESIDENCE ABROAD.** A naturalized citizen who returns to the land of his fathers and there resides for two years loses his American citizenship, if he acquires through such residence citizenship in the old country by the laws thereof. Regardless of the laws of such country, he loses his American citizenship, with certain exceptions, if he resides in it for a period of three years. Loss of citizenship, again with certain exceptions, is sustained by any naturalized citizen who resides continuously for five years in any other foreign country.

With regard to the three exceptions noted, we should bear in mind that the great majority of naturalized citizens are never in a position where any one of the exceptions will apply to them, and we may conclude that their privileges are essentially the same as those of the native-born citizens.

Dual citizenship under the Fourteenth Amendment. The clause of the Fourteenth Amendment which immediately follows the sentence defining citizenship prohibits the states from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." It is important to recall that under our federal system of government there are two citizenships. We are citizens of the United States and, if we live in some state, as nearly all of us do, we are citizens of that state by virtue of our national citizenship. Because the states are compelled to accept as their citizens any citizens of the United States who choose to reside in them, we commonly regard state citizenship as of little importance. But it exists just the same. There are privileges and immunities which we enjoy as citizens of the United States and there are other privileges and immunities which we enjoy as citizens of the states, even if we do get the latter through our possession of the wider national citizenship.

1. **SOME PRIVILEGES INCIDENT TO STATE CITIZENSHIP.** The constitutional

provision quoted above clearly restricts the states only in regard to depriving a person of the privileges which he holds as a citizen of the United States. Many privileges one enjoys are privileges which are incident to state citizenship and, therefore, do not fall within the terms of the prohibition. Marriage, divorce, control of children, property rights, and nearly all other rights connected with life, liberty, and the pursuit of happiness are rights over which states have control. When the State of Louisiana conferred upon a company a slaughterhouse monopoly within the city of New Orleans, some independent butchers went to court with the argument that the state, in not permitting them to carry on their business within the city, had abridged their privileges and immunities as citizens of the United States. From what was said above, we can easily understand why the Court held that the privilege of slaughtering stock in a city was not a privilege conferred by United States citizenship, but a matter over which the states had control.⁷

2. PRIVILEGES INCIDENT TO NATIONAL CITIZENSHIP. In the same decision, the Court enumerated some of the privileges incident to national citizenship. The citizen of the United States may "demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government; . . . use the navigable waters of the United States"; enjoy all rights secured to citizens by treaties with foreign nations; and, of his own volition, become a citizen of any state, by a bona fide residence therein. The Court has mentioned other privileges of the citizen of the United States; but, upon examination, it appears that they are not the exclusive privileges of citizens, being enjoyed by aliens and citizens alike. For example, the privilege of seeking the protection of the government and to use its courts can hardly be said to be exclusive privileges of citizens of the United States. If "privileges or immunities" of citizens of the United States mean anything they mean that citizens enjoy rights or privileges which aliens do not enjoy. There are few such privileges, and they are all, or nearly all, specified above. The truth is that the clause of the Fourteenth Amendment under discussion gives the citizen of the United States no special status or advantages he did not have before the Amendment was adopted. In 1935 it seemed that the Supreme Court was ready to give a much broader meaning to the privileges and immunities clause, for in *Colgate v. Harvey*⁸ it held that the right to carry on business across state lines was a privilege of citizens protected by the Fourteenth Amendment. But in a later case⁹ the Court returned to its original and restrictive interpretation of the clause.

⁷ *Slaughterhouse Cases*, 16 Wall. 36 (1873).

⁸ 296 U.S. 404 (1935).

⁹ *Madden v. Kentucky*, 309 U.S. 83 (1940).

IV. THE SUFFRAGE ¹⁰

The privilege of voting is commonly associated with citizenship. Not all citizens have the privilege, but in all states voters must be citizens of the United States. The Constitution of the United States, which lays down the basic law of citizenship, leaves the matter of suffrage qualifications, with certain exceptions, to the states.

1. **The suffrage provisions of the Federal Constitution.** First, in congressional elections all persons who by state law have the privilege of voting for members of the lower house of a state legislature may vote for Congressmen.¹¹ We note that this provision simply accepts the qualifications which the states establish.

Second, a section of the Fourteenth Amendment, adopted in 1868, carries the threat that states which deny the right to vote to male citizens who have attained the age of twenty-one will have their representation in Congress reduced in the proportion which the number of such male citizens bears to the total number of male citizens twenty-one years of age residing in such states. This provision marks an attempt to force the states, especially the Southern states, to give the emancipated Negro the franchise. It has never been enforced and is probably unenforceable. No person is enfranchised by it, either in fact or in law.

Third, the Fifteenth Amendment, ratified in 1870, provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. Notice that the Amendment does not definitely place the ballot in the hands of the colored man. It provides only that the ballot shall not be withheld from him because of his race or color or because he has been a slave. If it is withheld for other reasons (and we shall presently learn that they were easily found), the Negro's case is not covered by the Amendment.

Fourth, the Nineteenth Amendment, adopted in 1920, carries the provision that citizens shall not be denied the right to vote on account of sex. Its phraseology is exactly the same as that of the Fifteenth Amendment.

DOES THE CONSTITUTION GIVE ANYONE THE RIGHT TO VOTE? The statement has been made that "the Constitution of the United States does not confer the right of suffrage upon anyone."¹² In a technical sense this is true. For instance, a Negro woman whose race and sex we think of as

¹⁰ R. C. Brooks, *Political Parties and Electoral Problems* (1933 ed.), Ch. XIV; H. R. Bruce, *American Parties and Politics* (1935 ed.), Ch. XVI; A. N. Holcombe, *State Government in the United States* (1931 ed.), Chs. IV and VII; V. O. Key, Jr., *Politics, Parties, and Pressure Groups* (1942), Ch. XVII; K. H. Porter, *History of Suffrage in the United States* (1918); E. M. Sait, *American Parties and Elections* (1942 ed.), Chs. II-IV.

¹¹ Art. I, sec. 2, cl. 1, and the Seventeenth Amendment.

¹² *Minor v. Happersett*, 21 Wall. 162 (1874).

having received the suffrage by the Fifteenth Amendment and the Nineteenth Amendment, respectively, cannot vote unless she meets the general suffrage qualifications established by her state. State law may deprive persons of the privilege of voting on any grounds other than race, color, previous condition of servitude, and sex. In theory, a state could close the polls to all except millionaires, or to all except paupers; to all except college graduates, or to all except illiterates; and establish many other ridiculous suffrage qualifications, remaining all the while within the letter of the Constitution. But, taking a practical view of the matter, we can say with all assurance that the Constitution does confer the suffrage upon tens of thousands—that many Negroes (despite the discriminations in the South) and women in a number of states have the ballot through the suffrage amendments.

2. The states and white manhood suffrage. Universal white manhood suffrage was established in this country by the independent action of the several states. Some of them established it rather early in our history as a nation; others delayed the innovation until around the middle of the nineteenth century. In spite of the long opposition to this feature of democracy on the part of some of the older states, it can be said that this nation was the first to accept the principle of universal manhood suffrage. A brief survey of the development of the suffrage is eminently worth while.

RESTRICTED SUFFRAGE IN THE COLONIES. The colonies, with a few exceptions of brief duration, kept the suffrage hedged about with various qualifications. The New England colonies applied religious and moral tests. Massachusetts Bay required church membership, and gave that status such a narrow interpretation that three fourths of its adult males were excluded from the suffrage. A certificate of religious character or a proof of orthodoxy might be required in Plymouth. Not satisfied with that, Plymouth, as well as the other New England colonies, further reduced the ranks of the electorate by excluding from them such persons as liars, drunkards, and swearers. Much more common and much more persistent was the property qualification for voting. Some colonies, following the old English rule, required the forty-shilling freehold; others, a freehold worth forty or fifty pounds; still others, a stipulated number of acres. In some colonies, personal property to the amount of forty or fifty pounds gave a colonist the right to vote. The requirements differed in the colonial towns, frequently even in the towns located in the same colony. In some towns, those who possessed any freehold could vote; in others, those who occupied or owned a house were legally qualified. It is estimated that, as a result of these and other restrictions, the number of those qualified to vote varied from two per cent of the population in the city of Philadelphia to sixteen per cent in Massachusetts. By present-day standards,

the colonies had a very restricted suffrage; but by comparison with the English suffrage in the eighteenth century, it was reasonably liberal.¹³

THE REVOLUTION BROUGHT FEW IMMEDIATE CHANGES. The Declaration of Independence did not bring any immediate and general extension of the suffrage; for voting is not one of the "unalienable rights" of man. Nor did the Revolution itself lead to any wholesale enfranchisements; for the war was against a government without, and not against a reactionary system within. The period of the Revolution did, however, have a liberalizing tendency with regard to the suffrage. Although property remained the basis of suffrage in the states, some of them reduced the amount formerly required, and in some cases personal property might be substituted for real property.¹⁴

THE MOVEMENT FOR MANHOOD SUFFRAGE. Even before 1800, the West, with its social and economic democracy, began to establish political democracy as well. In the cities, the laboring classes, the product of a rapidly expanding industry, insisted that the older states fall in line with the movement for manhood suffrage. Although their leaders were not so able, they were no less indefatigable than the leaders of the group which vainly attempted to retain the property qualifications. Learned and well-born gentlemen were not needed to lead a movement which embraced the conviction of the masses that in a democracy all men should have a part in the government. Conviction and faith do not ordinarily yield to logic; and if they can be supported by specious logic, their triumph is not far short of a certainty. Against the learning, wisdom, and logic of such giants as Chancellor Kent, Daniel Webster, and Joseph Story, representatives of the old order, the prophets of the new order, while intellectually helpless,¹⁵ were not lacking in a certain very effective cleverness which may be illustrated by a story. "Let us assume that the property qualification for voting is fifty dollars," said a popular leader to the opposition. "Take the case of a man whose property is represented by an ass worth fifty dollars. On an election day he rides the ass to the polls and votes. Before the next election his ass dies, and the man finds that his franchise is likewise dead. Who had the vote while the ass was alive, the man or his ass?"

MANHOOD SUFFRAGE ADOPTED. But time was on the side of the man whose ass had died. Even before the end of the eighteenth century, five states had manhood suffrage. Before 1821 all but six states had abolished property qualifications. The same year New York abolished it after a memorable struggle. The states then retaining the qualification all abolished it in time, North Carolina (1856) being the last to do so. At that

¹³ A. E. McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* (1905); Sait, *op. cit.*, pp. 18 ff.

¹⁴ Sait, *op. cit.*, pp. 23 ff.

¹⁵ Porter, *op. cit.*, pp. 47 ff.

date the tax-paying qualification had passed out also, except in four states. For better or for worse, universal manhood suffrage was practically established. Of course the Negroes, with a very few exceptions, did not have the vote; but nearly all the Negroes were slaves and they were seldom, if ever, thought of in connection with political privileges.

3. The Negro and the ballot. The Southern states were forced to ratify the Fourteenth Amendment and to give former slaves the vote as conditions of their return to membership in the Union. Since there was no legal method by which they could be compelled to retain Negro suffrage after they were back in the Union, the Fifteenth Amendment, which carried the provision that the ballot should not be withheld on account of race, color, or previous condition of servitude, was adopted (1870).

WHY THE ATTEMPT TO ENFRANCHISE THE NEGRO WAS MADE. This Amendment was placed in the Constitution in spite of the fact that the freedmen had not asked for the ballot, that they were not capable of using it intelligently, and that only a small number of the Northern and Western states had given suffrage to the Negro. It was argued that justice to the Negro demanded it; that it was necessary to the Negro's protection from his former master; that it was a fitting punishment for the former rebels. As is so often the case, the real reason was not publicly stated. It was that the Republican party needed the Negro votes, which it could reasonably hope to get in view of the fact that the Negro was primarily indebted to it for his freedom, citizenship, and, finally, for his ballot. Negro suffrage was an artificial creation and it was doomed to failure in the Southern states, where nearly all the Negroes resided and where its proponents were most anxious that it should be established.¹⁶ •

NEGRO FIRST DEPRIVED OF BALLOT BY INTIMIDATION. While Negro suffrage was in operation in the South, the desire of those who wished to see the Southerners punished and humiliated was fulfilled. The "scalawags" of the South were joined by the "carpetbaggers" of the North in exploiting the colored voters, and the state governments were soon a disgrace to the nation. Facing these conditions, the more representative element in the Southern states arose and, by fair means in some cases, but more frequently by trickery, violence, and threats of violence, regained control of the governments. A group of horsemen wrapped in sheets and hooded with pillowcases might ride in ominous silence through a Negro settlement on the eve of an election; a band of whites might seize a Negro on his way to the polls and throw him into a pool; and in many less picturesque, but equally effective ways, the Negro might be prevented from exercising the privilege of the franchise. Such high-handed conduct was made punishable by act of Congress and a few convictions were actually secured,¹⁷ but the difficulties attending any general enforcement of a law in the localities

¹⁶ Sait, *op. cit.*, pp. 40 ff.

¹⁷ Ex parte Yarbrough, 110 U.S. 651 (1884).

where the great majority of the people were hostile to it are too obvious to call for mention.

THE NEGRO LEGALLY DEPRIVED OF THE RIGHT TO VOTE. Their governments under normal control again, the Southerners proceeded to put the Negro out of the political picture by provisions of their state constitutions. This was easily done in most cases without any violation of the letter of the Fifteenth Amendment; for the Amendment simply prohibited a denial of the suffrage on account of race, color, or previous condition of servitude. Those parts of the state constitutions which had to do with the suffrage did not exclude the Negro as a race. That would have been in direct violation of the Amendment; but the framers of the state constitutions took advantage of the Negro's well-known habits and weaknesses. A few examples will make this perfectly clear.

Illustrations. Negroes were given to migration within certain limits. The whites took advantage of this by placing clauses in their constitutions requiring long periods of residence as a qualification for voting. Thus, a Negro was not kept from voting because he was a Negro, but because he did not reside long enough at one place. The Negro was usually in poverty. A poll tax was found helpful in keeping him at home on election day. A requirement of property ownership to the amount of several hundred dollars took further advantage of the poverty of the colored race. The Negro was usually unable to read and write. The requirement that voters must be able to read and write wrecked many a colored man's ambition to be an elector. Negroes were often loose in their domestic life. Very well; no one should have the right to vote who had been found guilty of adultery, bigamy, or of assault and battery upon his wife. Neighboring chicken roosts and watermelon patches were likely to receive nocturnal visits from colored men. Any person guilty of petty thievery was denied the right to vote.

THE GRANDFATHER CLAUSE. The tests mentioned above were supposed to be applied to all persons, and in order to avoid the tragedy of having propertyless and ignorant whites disfranchised along with their economic and intellectual equals of the colored race a way out had to be found. It was found in the grandfather clause adopted by some half-dozen states. The clause varied slightly in the states, but the typical one provided that all persons who voted prior to January 1, 1867, and the descendants of such persons should be enrolled permanently as voters without regard to property or literacy. Other provisions associated with the grandfather clause authorized permanent registration for those who understood the duties and obligations of citizenship, and for those who could explain any section of the Constitution when it was read to them.

Designed for the white man. The grandfather clause did not disfranchise the Negro. He was already disfranchised by the other tests. The purpose of the grandfather clause was to admit illiterate whites who could

not meet those tests. Strictly speaking, it was not anti-Negro, but pro-white. As to the use white citizens made of the clause, the figures indicate that there was no general rush to take advantage of its beneficence. Resort to its use was an acknowledgment of illiteracy or poverty, and the "pure Anglo-Saxon stock" of the South had too much pride to confess these deficiencies or preferred to take the chance of passing the other tests administered by kindly registration officials whose chief interest was in maintaining white supremacy.

Declared unconstitutional. The grandfather clause was not a permanent fixture. It ran for a time estimated to be sufficient for the enrollment of all white men who might care to take advantage of it. The time varied in the states from a few months to eight years. In 1915 the clause in the Oklahoma Constitution was declared void on the ground that, in admitting to the suffrage illiterate men whose ancestors were entitled to vote prior to 1866, it admitted all illiterate whites and excluded all illiterate Negroes, thus violating the provision of the Fifteenth Amendment that the suffrage should not be denied on account of race.¹⁸ This was the first of the "test acts" of the Southern states to be declared void. This fact did not mean a new day for the Negro, for we have learned that the clause with the picturesque title, even while it was in operation, had very little to do with the disfranchisement of the Negro.

But the Negro still does not vote. In the greater number of Southern states the Negro no longer makes strenuous efforts to vote. If he does vote, he must meet all the requirements of the law for voting (sometimes with a few extras thrown in for good measure), and the question of his meeting them is determined by unsympathetic registration officials. The Negro is seldom able to give these officers what they regard as a reasonable interpretation of a section of a constitution. If the Negro should succeed in this, he is then asked how many pardons the governor issued during the last year, or how much revenue a particular county paid into the state treasury. The fact that such knowledge is not required by law makes no difference. On the other hand, white persons are asked very simple questions or none at all. Two stories will illustrate the manner in which the tests are applied to the two races. An illiterate white man was asked to give the most important provision of *Magna Charta*. He replied, "That no nigger can vote." He was immediately enrolled as a voter because he "understood the duties and obligations of a citizen and was attached to the principles of republican government." An intelligent Negro came forward with the hope of convincing the officers that he possessed the qualifications requisite for voting. He answered question after question. His inquisitors sat in awkward silence, trying to think of a question he could not answer. Finally, one of them brightened up and asked, "What is the writ of *certiorari*?" "That," answered the Negro with extinguished

¹⁸ *Quinn v. United States*, 238 U.S. 347 (1915).

hopes, "is one thing that is going to keep one Negro from voting." Yet Negroes do vote in the general elections in a few Southern states. For example, North Carolina and Tennessee permit quite a number of them to vote. But the states in the real Black Belt allow only a small number of "good" Negroes to exercise the franchise.

THE NEGRO AND THE SOUTHERN PRIMARIES. All the foregoing applies in regard to qualifications for participation in regular elections. What is the status of the Negro in the primary election? Up to 1941 the courts held that primary elections were not elections. If this were true, then perhaps the Fifteenth Amendment did not stand in the way of a wholesale disqualification of Negroes as a race for participation in such "elections." The Southern states did not take this bold step, but left the matter of keeping the Negro out of the primary elections to the ingenuity of the officers of the Democratic party. As the Republican party had not enough voters in the greater number of the Southern states to make it worth while to conduct a primary, the Negroes were thus fairly effectively excluded from the primaries. But in 1923 the State of Texas attempted by statute to exclude Negroes from the primaries. This statute was declared void by the Supreme Court of the United States, as being in violation of the "equal protection of the law" clause of the Fourteenth Amendment. It was not necessary, therefore, for the Court to examine the relation of the statute to the Fifteenth Amendment.¹⁹ The Texas legislature then authorized the executive committee of the party to fix the qualifications of party members—in effect, to exclude Negroes from the primaries. This act the Supreme Court of the United States also held to be in violation of "equal protection," on the ground that the state was authorizing a discrimination against colored citizens.²⁰ The Court seemed to intimate, however, that if the party were left to act upon its own initiative, it might exclude Negroes at will, since the Fourteenth Amendment prohibits only *state* (official) discrimination—not *private* discrimination. Acting upon this theory, the Democratic state convention, by resolution, made the party exclusively white. In *Grovey v. Townsend*²¹ the Supreme Court of the United States held that this resolution, being an act of a private political organization and unsupported by any positive state legislation, was not prohibited by the Fourteenth Amendment.

Grovey v. Townsend seemed to settle the question of the authority of a political party to exclude Negroes from its primaries, but not for long. In *United States v. Classic*,²² the Supreme Court held that a primary election is an essential phase of the election process. Although the decision in this case had nothing to do with the exclusion of Negroes from primary elections, the holding that the laws of the United States designed to protect

¹⁹ *Nixon v. Herndon*, 273 U.S. 536 (1927).

²⁰ *Nixon v. Condon*, 286 U.S. 73 (1932).

²¹ 295, U.S. 45 (1935).

²² 313, U.S. 299 (1941).

the rights of citizens to vote in congressional elections are applicable also to congressional *primary* elections certainly strengthens the Negro's legal claim for the right to vote in the primaries. Furthermore, the decision seems to point to the day when the Court will hold that the Fifteenth Amendment prohibits any state from depriving any citizen of the United States of the right to vote, either in a general election or in a *primary* election, on account of race, color, or previous condition of servitude.²³

SOUTHERN REPUBLICANS AND NEGRO SUFFRAGE. We would do the Democratic party in the South an injustice if we did not state that the Southern Republicans are almost as much opposed to Negro suffrage as are the Democrats. A New Orleans attorney, Charles F. Borah, often reminded his brother, the famed Senator, that Southern Republicans should forget the Negro and seek white converts.²⁴ In 1920 John J. Parker, campaigning for Governor of North Carolina on the Republican ticket, is reported to have said: "The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men of either race or by the Republican party of North Carolina."²⁵ Two years later the Republican organization of the same state "deplored" the attempts of the Democrats to bring the Negro question into the campaign, arguing that the real Republicans of the state were white men and women. The fact, then, that such a small percentage of Negroes in the South vote is due not only to Democratic opposition, but also to Republican opposition. The latter is perhaps a little more cautious but hardly less real than the former.

NEGRO SUFFRAGE NORTH OF THE MASON AND DIXON LINE. As the Negro proceeds from the far South he finds that his opportunity to vote measurably improves as he passes through North Carolina and Virginia, Tennessee and Kentucky, and that when he crosses the Mason and Dixon line, despite some prejudices in the North, he votes on equal terms with members of other races. Negroes were not numerous in the North when the Fifteenth Amendment was adopted (or it might not have been adopted), but now several millions of them reside there. A very large proportion voted the Republican ticket until 1932, when they supported Roosevelt. This Administration gave Negroes more than promises; it gave some of them good government positions and it placed thousands on relief. (No doubt most of them were eligible for it.) There has been no noticeable trend of Negro voters back to the Republican party. Yet the affiliation with the Democrats may be only temporary, for the Negro is still far behind the white man in the enjoyment of civil, political, and economic rights. While the Negroes were voting the Republican ticket, the party

²³ R. E. Cushman, "Constitutional Law in 1940-1941," *Am. Pol. Sci. Rev.*, XXXVI, 269-271 (April, 1942).

²⁴ C. O. Johnson, *Borah of Idaho* (1936), pp. 15, 169-170.

²⁵ Quoted by Walter White, "The Negro and the Supreme Court," *Harper's*, January, 1931, p. 239.

often intimated that it might take action to secure to the Southern Negroes their civil and political rights. This is as far as the matter ever went. Negroes now insist that the Democratic party right their wrongs. They want anti-lynch bills, the abolition of the poll tax in the eight Southern states which require it, equal rights in employment, and equal rights to fight, on land and sea and in the air, for their country. Northern Democratic government officials and representatives would go a long way to extend these rights; Southern congressmen have been fairly successful in blocking their efforts. In 1938 the opposition of Southern representatives and senators prevented the enactment of an anti-lynching bill, and in November, 1942, Southern senators successfully filibustered against a bill which would have abolished the payment of a poll tax as a prerequisite for voting in national elections. The Negroes may get discouraged, become embittered, and return to the party of Lincoln.

4. **Woman suffrage.** During the Revolution, Abigail Adams urged her sturdy husband John to do something about independence for women now that he was doing so much for the independence of a nation. While her spouse had great confidence in her judgment on most matters, the records do not show that he was impressed with the soundness of her request in this particular instance. Her request would have received more consideration had it been addressed to Richard Henry Lee, who favored woman suffrage.²⁶ By an inadvertence, it seems, the State of New Jersey in 1776 gave the ballot to all inhabitants worth fifty pounds. Some thirty years later the privilege was withdrawn from the women, seemingly on account of the feeling among the men that the women were taking the privilege too seriously—probably voting for the “wrong” candidates. It was not until nearly the middle of the nineteenth century that a strong movement for woman suffrage got under way, and not until a generation ago that any great success was achieved. Suffrage was granted gradually, state by state, and finally by the nation. Perhaps the women were required to wait too long for the ballot, but it certainly can be said that unnecessary and unfair delay was an improvement over the premature attempt to enfranchise all Negroes by constitutional fiat.

THE POSITION OF WOMEN A CENTURY AGO. Women sought the ballot because they thought they saw in it a means of bettering their civil and social condition, which was not altogether enviable. A hundred years ago women were commonly denied the right to manage their own property and to make a will. The doors of the higher institutions of learning were closed to them; so were the avenues to the leading learned professions. Women who tried to take part in public affairs were referred to as “she-hyenas,” “unsexed creatures,” and the like. Women were to be looked after by the men, and, above all, they were to do their part by the men. The wife should give her husband unqualified obedience, regardless of

²⁶ C. E. Merriam, *American Political Ideas* (1920), p. 81.

his crimes. If the husband should be bad or wicked, the wife must be content with a gentle remonstrance.²⁷

Women first came into public life through their efforts to free the slave. Nearly all the men objected to their taking an active part in this movement, and in consequence the women turned their attention to their own disabilities. Furthermore, it was but natural that they should be led to compare their own inferior legal and social position with that of the slave. In 1848, they drew up a "Declaration of Sentiments" in the form of the Declaration of Independence.²⁸ The document is one of considerable interest as a few quotations from it will show.

"THE DECLARATION OF SENTIMENTS." "The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

"He has never permitted her to exercise her inalienable right to the elective franchise.

"He has compelled her to submit to laws, in the formation of which she had no voice.

"He has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners. . . .

"Now, in view of this entire disfranchisement of one half the people of the country, their social and religious degradation—in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States."

THE "NEGRO'S HOUR." This would indicate that the chief aim of the women was the suffrage. Some progress was made toward their goal before the Civil War, such men as Garrison, Beecher, Emerson, and Wendell Phillips having been won to their cause. The clergy still thundered, but the liberals listened and endorsed the demands of the women. Some of the more optimistic women thought that the suffrage would have been won in the Civil War period but for the injection of the Negro question, culminating in suffrage for the Negro.²⁹ It is probably true that the "Negro's hour" did delay the date of the political emancipation of women, but it does not seem that there was any general acceptance of the principle of woman suffrage during the Civil War and Reconstruction period.³⁰

YEARS OF DISCOURAGEMENT. For a generation following the granting of the suffrage to the Negro, the cause of the women seemed almost hopeless. Yet its proponents worked with the utmost zeal. They conducted

²⁷ Sait, *op. cit.*, p. 77.

²⁸ *Ibid.*, pp. 79-80, note.

²⁹ Catt and Shuler, *Woman Suffrage and Politics* (1923), p. 50.

³⁰ Sait, *op. cit.*, p. 81.

nearly five hundred campaigns with state legislatures to get the question submitted to the voters; nearly three hundred campaigns to get political organizations to include woman suffrage in their platforms; fifty odd campaigns to get male voters in the states to accept woman suffrage; campaigns with thirty successive Congresses—to give only a partial list of their activities. The reasons for the slow progress of the movement in the face of all this activity were about as follows: (1) The failure of Negro suffrage; (2) prejudice against women voting; (3) indifference to woman suffrage, even among a great body of women, many holding that they were already well represented by fathers, brothers, and husbands; (4) a feeling that if women had the ballot they would not exercise it, or that they would be moved by sentiment rather than reason in using it; (5) a fear in some quarters that women voters would impose a "prohibition menace" and other reforms upon the country; (6) probably a fear in other quarters that they would "purify" politics. No doubt the reader can add other reasons to this list.

THE ADOPTION OF WOMAN SUFFRAGE. The sparsely settled territory of Wyoming adopted woman suffrage in 1869, and entered the Union with it twenty years later as the first full suffrage state. It was followed by Colorado (1893), Idaho (1895), and Utah (1896). No other states adopted it for some time; but in the five years beginning with 1910 seven other Western states joined the four pioneer woman suffrage states, while Illinois gave women the privilege of voting in local elections and for presidential electors. About this time, the effort to get woman suffrage for the nation through an amendment to the Federal Constitution was beginning to be pushed with great vigor. This plan was very materially aided by the adoption of woman suffrage by the State of New York in 1917, by the large number of votes (although not majorities) the proposition received in several other Eastern states, and, above all, by the very conspicuous service the women rendered our country during the First World War. The necessary two-thirds vote in both Houses of Congress was secured in 1919, and ratifications followed with such reasonable dispatch in the states that the Nineteenth Amendment was proclaimed in time to enable women the country over to vote in the presidential election of 1920.

RESULTS OF WOMAN SUFFRAGE. Woman suffrage came as a natural development of the growing independence of women. It was not an artificial creation as was the case with Negro suffrage, and there is little or no likelihood that it will become a farce. It would seem that there is little difference between the sexes in the matter of the use of the ballot. The fear in some quarters that women would purify politics has unfortunately not been realized. Wisdom and folly, sentiment and sense, integrity and perfidy are not distinguishing sex characteristics. At any rate, women have the ballot, and as mature citizens, taxpayers, followers of professional

callings, business employees, and home-makers they deserve it, if the males of the species do.³¹

5. Present qualifications for voting: CITIZENSHIP. In national, state, and local elections, throughout the United States, the requirements for the suffrage are essentially the same. Citizenship in the United States is required in every state. Formerly, about twenty states allowed certain classes of aliens to vote; but because of the abuses which grew up around this practice, and because of the nationalistic and nativistic spirit which has prevailed in recent years, all of these states have now abandoned the practice.³²

AGE. The second requirement is that of age. Twenty-one was the age fixed by English law, although when Parliament granted suffrage to women, in 1918, the voting age for them was fixed at thirty, presumably because of a groundless fear that the women, outnumbering the men, might take the government from them. Ten years later Parliament passed the "Flapper Bill," extending suffrage to women who had attained the age of twenty-one. All the American colonies, and later the states, fixed the voting age at twenty-one years; following early English practice. The age requirement is not the same in all countries, but twenty-one seems to meet with the most general endorsement. In recent years compulsory military service for men in the United States who have reached their eighteenth birthday has led to a movement to lower the age limit for the suffrage to eighteen.

RESIDENCE. Third, there is always a residence requirement. The state laws vary in the requirement of residence from three months to two years, one year being the most common specification. Shorter periods are required in the counties and cities, where the time varies from ten days to one year, and still shorter periods of residence are required in the precincts. The place of legal residence is not necessarily the same as the actual place of residence. A voter may spend the greater part of the time in some place other than that of his legal residence, but as long as he shows some interest in his legal residence, his act of voting there is not ordinarily questioned.

LITERACY TEST IN SOME STATES. Two other qualifications for voting, literacy and tax paying, have a limited application. About a third of the states apply some sort of literacy test, a common form of which is reading the Constitution and writing one's name. We have already discussed the operation of this test in the South, where it excludes a high percentage of the Negroes from the exercise of the suffrage. Eight states outside the

³¹ For an analysis of results see Mildred Thompson, "A Decade of Women's Suffrage," *Current History*, October, 1930, pp. 13-17; Sait, *op. cit.*, pp. 96-106.

³² L. E. Aylsworth, "The Passing of Alien Suffrage," *Am. Pol. Sci. Rev.* (1931), XXV, 114-116.

South employ the test, but it is estimated that it disqualifies very few citizens in those states. Some would apply a more exacting educational test to all who seek the privilege of voting. There is little likelihood, however, that more rigorous tests will be applied in the near future, for the cry of politicians that democracy is threatened would have great weight. Besides, a plausible argument is made against any literacy test by those who say that many illiterates have keener perceptions and are better judges of men than their literate fellow citizens.

THE POLL TAX. In the late 'twenties some fifteen states required all voters to pay an annual poll tax ranging from one to two dollars. At the present time, it is imposed in only eight states, all of them in the South.³³ The reason for this tax is obvious. It is to keep Negroes away from the polls. It also disfranchises tens of thousands of "poor whites," but this does not disturb the dominant element in those states, for its members would probably admit, in private, that poor whites have no particular claim as citizens. Furthermore, if it becomes desirable to permit some of these people to vote, it can be arranged by paying the poll tax for them, or even by issuing poll tax receipts "wholesale and free" to party workers for discriminating distribution among the voters. Many Southerners who stand in opposition to the reactionaries who control their states have become very active in organized efforts to repeal the tax, and, as noted above, Congress has seriously taken up the question of outlawing it as a requirement for participation in national elections. In recent years, several Southern states have repealed the poll tax, and it is possible to look forward to the time when it will be as extinct as the old property qualifications for voting.³⁴

DISQUALIFICATIONS. Felons, idiots, and the insane are regularly denied the ballot, and in many states persons guilty of election offenses are disqualified from voting. Paupers, vagrants, and persons under guardianship are not allowed to vote in many states. There are still other disqualifications, but those mentioned are the most common.

REGISTRATION. If an individual meets all of the qualifications as outlined above, he must still comply with a formality before he can vote—he must go before registration officials and have his name placed on the list of voters. The purpose of registration is to ascertain in advance of elections whether those desiring to vote actually possess the qualifications established by law. It is one of the principal safeguards against illegal voting. The method of registration usually employed calls for the actual presence before registration officials of persons who wish to qualify for voting. In the rural communities and small towns of a number of states,

³³ They are Alabama, Arkansas, Georgia, Mississippi, South Carolina, Tennessee, Texas, and Virginia. Tennessee repealed her law in 1943, but her supreme court declared the repeal unconstitutional.

³⁴ American Council on Public Affairs. *The Poll Tax* (1940).

one such personal registration is sufficient, as long as the voter resides in the same precinct, for all succeeding elections; but most states require annual or biennial personal registration in cities, and some require the same periodic registration in the rural districts. Permanent registration is certainly satisfactory in the rural areas, and some authorities favor it for cities. Periodic registration is inconvenient, and many potential voters forget or neglect to register.

In communities where persons are usually known to the officials, registration is a relatively simple process, the name and residence of the individual often being all that is required. In cities, a great deal more information is usually required, such as statements concerning age, length of residence in particular places, occupation, location of employment, and signature. In some places, a description of personal appearance is required, the purpose of this being to prevent impersonation of voters at election time.

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Political Parties



Importance of political parties. A great deal has been said in previous chapters about our written constitutions as instruments of government. At the same time, it was shown that the written constitutions by no means represent the entire system of government. One of the most fundamental features of our political system, one which exerts a marked influence upon the whole democratic order, is the political party, a product not of written constitutions or laws but of political experience. The clauses of a constitution or statute may prescribe that appointments to office shall be made by the chief executive; but rare indeed is that President, governor, or mayor who makes appointments without consulting the leaders of his party. Laws are supposed to be enacted by a majority of the members of the legislative bodies, but in practice a few party leaders decide what laws those bodies shall enact. The President is supposed to make treaties with the advice and consent of two thirds of the members of the Senate, but the decision as to the Senate action may be reached at a White House breakfast to which the Chief Executive has discreetly bidden a few leading senators of his own party and possibly one or two of the opposition party.

The theory is that the people may vote for men of their choice; but, as a matter of fact, they may only choose between the men the party organizations submit to their sovereign will. The voters may actually want, let us say, a tariff reduction; but the party organization is sometimes able to secure their votes for a platform which calls for an increase in the tariff. So strong is party sentiment in the hearts of the majority of the people that, even when their party clearly violates their wishes, their sole protest is frequently no more than a sigh of regret; and if, perchance, some high-minded soul finds that he cannot in conscience support his party, he sadly remains away from the polls on election day, or deposits his ballot without enthusiasm and with great heaviness of spirit for the party whose principles he had hitherto "viewed with alarm" and whose immediate success would give him no emotional satisfaction. In abnormal times, however, as in 1932, the voter may cast his party affiliation to the winds. From these preliminary observations, it becomes obvious that the party, misunderstood and distrusted by the Fathers, has become the cornerstone of our political edifice.

I. A SKETCH OF PARTY HISTORY ¹

The Federalist era. Despite the Fathers' well-nigh unanimous opposition to "factions," we have had party government from the days of President Washington. The Federalists, who had taken the principal part in framing the Constitution, were in control from 1789 to 1801. The policies of this party, for which Hamilton was chiefly responsible, were as follows: payment of the national debt at full value and assumption of the debts which the states had incurred during the Revolution; the establishment of a national bank; the laying of import duties for the protection of American manufacturers; and the refusal to assist France in her war with England in return for the aid France had given us during our Revolution, even though the French and many Americans held that the treaty of 1778 between the United States and France obligated us to come to the assistance of France.

The rise of the Jeffersonian Republicans. This work of the Federalists, having the purpose of securing for the government the support of the conservatives and capitalists, was anathema to a rapidly growing opposition group known at first as Anti-Federalists, a few years later as Republicans, and finally, in Jackson's time, as Democrats. Jefferson, the great political philosopher and astute leader of the Republicans, brought to his side the greater part of the landed and laboring interests of the country. Republican leaders attacked the financial policies of the Federalists as being most inimical to the interests of farmers and laborers; they held that Congress was not authorized by the Constitution to establish a national bank; and, being devoted to the principles of liberty, the party did not view the French Revolution with horror, while many of its members favored the extension of aid to France in her war with England.

The end of the Federalists' régime. The activities of French sympathizers in the United States and the abuse which Republican editors and orators heaped upon the sensitive Federalists in high public office led to the passage of the famous Alien and Sedition Laws (1798). The Alien Law authorized the President to expel foreigners considered to be dangerous to the peace and good order of the country, while the Sedition Law stipulated rather severe penalties for those who criticized the national government or its officers. These acts brought forth a storm of criticism, and sealed the fate of the already weakened Federalist party. In 1800 Jefferson, hated and feared by the "best people" as an atheist, theorist, and

¹ C. A. Beard, *The American Party Battle* (1928); R. C. Brooks, *Political Parties and Electoral Problems* (1933 ed.), Chs. IV-VII; H. R. Bruce, *American Parties and Politics* (1936 ed.), Chs. IV-VIII; A. N. Holcombe, *The Political Parties of Today* (1925 ed.), Chs. I-X; V. O. Key, Jr., *Politics, Parties, and Pressure Groups* (1942), Ch. IX; S. Lewis, *Party Principles and Practical Politics* (1928), Chs. II-XI; E. M. Sait, *American Parties and Elections* (1942 ed.), Ch. VIII-X; J. A. Woodburn, *Political Parties and Party Problems in the United States* (1924 ed.), Chs. I-XI.

trickster who would subvert the government, was elected President. The Federalists were practically exterminated as the Republicans won victory after victory in succeeding elections.

Republican ascendancy. Did the Republicans immediately reverse the policies which the Federalists had put into operation? Not at all. Severe critic of the Federalist system that he was, Jefferson's political wisdom prevented him from tearing up the system root and branch. Following his Federalist predecessors, he did his best to remain neutral in the European wars. Like them, he was loyal to the Constitution. As they had strained its meaning when they established a national bank, so he gave its terms a broad construction when he purchased Louisiana. In 1811 the charter of the First Bank of the United States expired, and the Republicans, faced with the grim reality of financial disarrangement following the second war with England, chartered the second national bank in 1816. The party even enacted a high tariff law in the same year, maintaining that it would protect agriculture. The Federalists, who in power had championed a strong central government, now opposed practically everything the Republicans did, and many New England Federalists talked seriously of disunion during the disastrous War of 1812. In other words, the difference between the "Ins" and the "Outs" was much greater than the difference between Federalists and Republicans—a very common fact in party history.

Democrats and Whigs. The Federalists ceased to play a part in politics after 1816. The Republicans had full control, but their ranks were divided into factions often led by jealous and ambitious persons who engaged in intrigue and made rather unseemly scrambles to gain office. In 1824 there were four Republican candidates for the presidency. Jackson received the highest number of popular votes, but not the necessary majority in the electoral college to give him the presidency. The choice of J. Q. Adams by the House of Representatives caused the hero of New Orleans and his followers to feel that they had been defrauded. Jackson and his lieutenants proceeded to organize the new Democratic party and to enlist the support of the frontier people in the newer states, the laboring classes, and substantial numbers from other groups. In general, Jackson's following was similar in composition to that which elected Jefferson in 1800. His victories in 1828 and in 1832 were decisive. But this headstrong Executive, whose followers were for the most part crude and whose counselors were for the most part spoilsmen, did not appeal very strongly to a large class of his more urbane fellow citizens. There were more important reasons for opposition. Financial interests in the East were very naturally opposed to his policy of destroying the national bank; manufacturers were calling for higher tariff rates than he was willing to approve; Southerners were opposing his stand against South Carolina's nullification policy; officeholders whom he had summarily removed were resentful, and office seekers who did not get appointments were vexed. Even in the

West, there were those who withheld support from Jackson because he disapproved of their scheme to draw large sums from the federal treasury for internal improvements. From these discordant elements, who could whole-heartedly unite only in opposition to Jackson, the National Republican or Whig party was formed.

DIFFICULTIES OF THE WHIGS. Although the Whig party had such leaders as J. Q. Adams, Clay, and Webster, it succeeded in electing only two Presidents—Harrison in 1840, and Taylor in 1848. Being composed chiefly of "antis" who could not agree upon a positive program, the party said very little about issues, making its appeal to voters primarily on the character of its candidates. This was well illustrated by the ridiculous "Log Cabin" campaign in 1840. The Democrats asserted that Congress had no constitutional authority to charter a national bank; the Whigs could do but little better than reply that their candidate, General Harrison, was content with an honest, plain man's beverage, hard cider. The Democrats urged Van Buren's re-election on his record in office; the Whigs shouted in chorus, "Harrison is a poor man and lives in a log cabin."² The two Presidents elected by the Whigs were popular generals, but a third general, Scott, was easily defeated by the Democrats in 1852. As the slavery issue came more and more to be the leading question of the day, the Whigs were hopelessly divided and the party was practically dead before 1856.

THE DEMOCRATIC PROGRAM. During the thirty years preceding the Civil War the Democrats had a fairly definite program, which included tariff for revenue only, state banking systems and opposition to a national bank, no federal funds for internal improvements, holding the public debt to a minimum, and non-interference with slavery. It won every presidential election except the two just mentioned; usually had a majority in Congress; and, as is generally the case with a long-dominant party, it succeeded in keeping a favorable majority of judges in the Supreme Court.

CONFLICTING SECTIONAL INTERESTS AMONG THE DEMOCRATS. In the decade before the Civil War, the Democrats of the South largely controlled the party. They insisted with increasing vehemence that slavery should be left alone and that they should have the right to carry their slaves into the territories. Furthermore, as cotton planters, they opposed the tariff, subsidies for shipping, and similar favors desired by business in the East. Rapidly growing industry in such states as Ohio and Illinois also wanted tariffs and other encouragement for business, which Southern Democrats opposed. The West wanted internal improvements at federal expense, which was contrary to Democratic policy. The hardy population of the West was for the most part hostile to the extension of slavery, and they were joined in this hostility by many people in the East who held that slavery was immoral and should be restricted or even abolished.

² Quoted in M. Minnigerode, *Presidential Years* (1928), p. 200.

Rise of the Republicans. With the Democratic councils largely directed by the Southern and pro-slavery element and the Whigs divided on the slavery issue, the time was ripe for a new party—the Republican party, which took its name from the earlier Jeffersonian group. The occasion of its founding was the passage of the Kansas-Nebraska Bill (1854), which repealed the famous Missouri Compromise. Even before the bill was passed, a mass meeting was held at Ripon, Wisconsin, where it was agreed that, if the bill did pass, a “Republican” party should be formed to oppose the extension of slavery. Many other mass meetings were held in the West and East after the passage of the bill. A convention at Jackson, Michigan, in the summer of 1854, nominated a complete Republican ticket for state offices. The first Republican national convention was held in Pittsburgh in 1856, for the purpose of perfecting a country-wide organization; and a short time thereafter a second convention was held at Philadelphia, where Frémont was nominated for the presidency on a platform which announced that it was the “imperative duty of Congress to prohibit in the Territories those twin relics of Barbarism—Polygamy and Slavery.” The platform also declared for the admission of Kansas as a free state, federal aid in constructing a transcontinental railroad, and national appropriations for the improvement of rivers and harbors. In the election of 1856, the party polled more than two thirds as many votes as the Democrats—a remarkable showing for a new party.

THE CAMPAIGN OF 1860. The Dred-Scott Decision, the Lincoln-Douglas debates, John Brown’s raid, the Panic of 1857, the failure of the Democratic administration to give New England manufacturers a tariff, all combined to give the Republicans a better chance for victory in 1860. At this time, they added to their platform of 1856 a declaration for an adjustment of the tariff for the encouragement of industry and a demand for the passage of a satisfactory homestead measure. In the campaign of that year the Democrats were split over the slavery issue: the group which favored allowing the people of a territory, upon its admission as a state, to decide the question for themselves, nominated Douglas; while the extreme pro-slavery element, holding that Congress had no power to interfere with slavery in the territories, named Breckinridge as their candidate. An odd assortment of Democrats, Whigs, and those who had belonged to the defunct American party styled themselves Constitutional Union men, said nothing about slavery, and nominated John Bell for the presidency. Lincoln received 1,866,452 votes, a plurality; but 2,815,617 ballots were scattered among his three opponents.

REPUBLICAN DOMINATION. The Democratic party was discredited by the Civil War and the events which led up to it, so that it did not become a formidable rival of the Republican party for about ten years after the war. In the meantime, the Republicans created a new national banking system, taxed state bank notes out of existence, gave industry the tariffs

it sought, and by the Fourteenth Amendment secured to business a large measure of protection from state interference. In other words, just as the Democrats in their period of domination had favored the Southern planters, the Republicans in turn favored the business interests of the East and West.

The Democratic revival. Reaction against the Republicans came on account of the mess they made of Reconstruction, which made the South solidly Democratic and which alienated a number of liberals in the other parts of the country. The party also lost support among the farmers on account of its protective tariff system; while its large number of grafters, spoilsmen, and various other mercenaries further injured its prestige. The Democrats were able to take advantage of the situation, and they made a fine showing in the Congressional election of 1874. Two years later, their candidate, Tilden, actually received a majority of the popular votes, but he failed to receive the necessary majority of electoral votes because the elections were contested in four states and the commission which decided the contests was composed of eight Republicans and seven Democrats.

Party equilibrium. From 1876 to 1896, the votes were fairly evenly divided between the parties. The Republicans won with Garfield in 1880, and with Harrison in 1888; the Democrats, with Cleveland in 1884 and 1892. The parties were extremely cautious about their platform declarations during this period, because they were fairly evenly matched in strength and because each party contained many members who were divided on the issues. Steadily falling prices in the period after 1870 made conditions very hard for debtors, many of whom were farmers in the West. Farmers and others complained about high freight rates and discriminating practices of railroads. The more radical of the debtor class asked at first for an increase in the issue of paper money, which would, in their opinion, bring about higher prices, better wages, and make it easier to pay debts. Later, they asked for the free coinage of silver, regulation of railroads, and similar measures for their protection and prosperity. The two leading parties were afraid of these issues and pursued the policy of "straddling." On the tariff, the Republicans generally indicated a preference for a protective policy; the Democrats a preference for a tariff for revenue only, or a tariff which would produce revenue and protect American labor.

The Populists. Owing to the fact that the major parties neglected some important issues and spoke in uncertain language on some others, a number of minor dissenting groups arose during the generation following the Reconstruction period. The most important and the last of these groups, before 1900, were the Populists, organized in 1890. The preamble of their platform in 1892 averred that the Republicans and Democrats struggled only for "power and plunder" while grievous wrongs were unredressed; that these parties now proposed "to drown the outcries of a plundered people with the uproar of a sham battle over the tariff, so that capitalists,

corporations, national banks, rings, trusts, watered stock, the demonetization of silver and the oppressions of the usurers may be lost sight of." After a number of other similar declarations, they stated their demands, as follows: government ownership and operation of railroads, telegraphs, and telephones; all excess land held by railroads and other corporations, and all lands owned by aliens, to be reclaimed by the government and held for actual settlers only; a national currency, "safe, sound, and flexible, issued by the general government only, a full legal tender for all debts, public and private, and without the use of banking corporations"; the "free and unlimited coinage of silver and gold at the present legal ratio of 16 to 1"; a circulating medium of \$50 per capita; a postal savings bank; and a graduated income tax. With this platform, the party made great headway in the West and won a number of followers in the South. It received over a million votes in 1892 and carried North Dakota, Colorado, Idaho, Kansas, and Nevada.

The Democrats become liberal. It seemed that the Populist party was likely to absorb the Western Democrats, and some observers felt that it might take the place of the Democratic party in the nation. Neither of these things happened, for the reason that the Democrats, in 1896, under the control of the West and South, adopted the essential principles of Populism. The Democratic platform denounced the "issuance of notes intended to circulate as money by national banks"; it denounced the McKinley tariff, which "proved a prolific breeder of trusts and monopolies," and "enriched the few at the expense of the many"; it denounced the decision of the Supreme Court invalidating the income tax law; and "government by injunction" was also included in the list of denunciations. The Democrats declared for the free-silver program of the Populists; demanded an enlargement of the powers of the Interstate Commerce Commission and such restrictions upon the railroads as would protect the people from "robbery and oppression"; and advocated federal improvement of the great waterways in order to secure easy and cheap transportation for the interior states. The Populists were fairly well satisfied with this platform, and they joined with the liberal Democrats in the support of Bryan for the presidency.

The Republican victory, 1896. The Republicans announced themselves unreservedly for sound money and a protective tariff, and nominated McKinley. The campaign of 1896, with the issues thus clearly drawn, was anything but a sham battle. The Democratic party, having become radical, very naturally lost the support of conservatives and carried only a few states outside of the South and West. The Republicans, under the skillful guidance of Mark Hanna, a hard-hitting business man, won their victory through the support of the manufacturing and commercial interests of the East and Central West.

The second period of Republican supremacy. The Democratic party

remained under the leadership of Bryan, who suffered a worse defeat at the hands of McKinley in 1900 on the issue of "Imperialism" (for example, acquisition of the Philippines) than he had received in 1896. The Democratic party was unable to recover in 1904, when it nominated a conservative candidate, Judge Alton B. Parker. Theodore Roosevelt's talk against trusts, his fight for conservation, his aggressive and picturesque conduct, brought him an easy victory. Bryan made a third attempt to win the presidency in 1908, but the people did not get very much excited over the tariff, trusts, and railroads; nor were the general denunciations of Republican policies effective. The genial Mr. Taft, Roosevelt's selection for the presidency, won by a wide margin.

Democratic victories. While the industrial and commercial classes were generally prosperous during the sixteen years of Republican domination, mutterings were heard from the farmers in the West even during the days of Theodore Roosevelt's occupancy of the White House. In Taft's administration, the Republican leaders went over still more definitely to the side of the business interests and showed no indication of heeding the requests of the agrarian group for such things as a revision of the tariff. Consequently, the mutterings and rumblings changed to revolt, and the Democrats won a majority in the House of Representatives in 1910. As no attempt was then made by the Taft administration to appease the revolting element, the breach was further widened between them and the regular Republicans. Taft was renominated by the "stand-pat" Republicans in 1912; and Theodore Roosevelt headed the Progressive forces, whose main principle was social and industrial justice. The Democrats, now under progressive rather than radical leadership, nominated Wilson. The division in the Republican ranks brought about the election of a Democratic President and Congress, although the victorious party received slightly less than 42 per cent of the popular votes. Under the able and determined leadership of the President, the Democrats fulfilled their platform pledges by the enactment of constructive legislation. In dealing with the belligerent powers in Europe, Wilson followed a moderate policy, acceptable to the majority of his fellow citizens. The Republicans were fairly well united again for the campaign of 1916; but President Wilson, reaping profit from campaign blunders of the Republicans, Democratic achievements in domestic affairs, and the slogan, "He has kept us out of war," led Mr. Hughes by some 600,000 popular votes and 23 electoral votes.

The Republican revival. There was a sort of truce between the parties during the time we were participating in the First World War: but the party struggle was resumed shortly before the war was won, when President Wilson appealed to the American people to return a Democratic Congress in the election of 1918. The appeal was resented as a reflection upon Republican loyalty and it increased the strength of the Republicans, who

gained control of both the Senate and the House. Everyone knows that Wilson's effort to bring the United States into the League of Nations soon became the important issue and that the Senate failed to approve the treaty which would have made the United States a member. The issue was not definitely settled, however, until the Democrats were buried in the Republican landslide in the presidential election of 1920. The Democratic disaster of that year was due to many causes other than the party's advocacy of the League. The war had left a burden of taxes. Living costs had greatly advanced. There were difficulties between capital and labor. Naturalized citizens with whose former countries we had warred were, of course, not enthusiastic about the party which had been in power during the war. Then, there was no doubt some quiet resentment against the Democratic administration on the part of many men who had been forced to perform military service. Furthermore, the country was tired of rigid and stern presidential leadership. It was even tired of idealism. All of this goes to explain the defeat of Cox, the Democrat named to succeed Wilson.

The third period of Republican supremacy. With Harding's election in 1920, the Republican party and the country returned as fast as possible to the "normalcy" he had advocated. If we may interpret the meaning of "normalcy" by the accomplishments of its champion and his party, it meant a return of the high protective tariff; reduction of taxes; no government interference with business; and an easy toleration of official shortcomings and corruption. The policy of vigorously supporting business and reducing taxes was continued by Coolidge, who became President upon the death of Harding in August, 1923. Coolidge was able to strengthen himself with the great mass of the people by his reputed silence, his devotion to the prosaic task of the day, and his frugality. He was easily nominated and elected to succeed himself in 1924. John W. Davis, eminent lawyer and diplomat, nominated by the Democrats because neither McAdoo nor Smith (the leading candidates) could muster the necessary two-thirds vote in the convention, received only 29 per cent of the popular vote, while Coolidge secured 54 per cent.

THE LA FOLLETTE PROGRESSIVES. Interest in the 1924 campaign was centered primarily on the efforts of La Follette, the candidate of the Progressives. Neither Harding "normalcy" nor Coolidge economy had given relief to agriculture, while many laborers felt that they were not getting their share of the vaunted prosperity. A Conference for Progressive Political Action, composed of varying grades of progressives and radicals, nominated Senator Robert M. La Follette, a rather persistently irregular Republican, for the presidency, and Senator Burton K. Wheeler, a less irregular Democrat, for the vice presidency. The platform, largely the work of La Follette, declared that "the great issue before the American people today is the control of government and industry by private monop-

oly," and he offered the following as his chief remedies: a constitutional amendment to deprive the courts of their power to nullify legislation, and to provide for popular election of federal judges; public ownership of railroads and water power; abolition of the use of the injunction in labor disputes; higher taxation of the rich; reduction of the tariff; reorganization of the national banking system; and a foreign policy to outlaw war and bring about drastic reduction in armament. His program for changes in the judiciary was the special object of attack in the campaign, and it seemed that many voters were genuinely frightened at his proposals on this subject. He received approximately 4,800,000 popular votes; but 15,700,000 voters preferred to "keep cool with Coolidge."

THE CAMPAIGN OF 1928. In the summer of 1927, Coolidge made his famous statement, "I do not choose to run." The following year Hoover was nominated by the Republicans. He was an engineer and an administrator of the highest caliber, but of unproved character as a politician. He was unpopular with some of the Republican leaders, but without a doubt the choice of the rank and file of the party. As was expected, the Democrats nominated Alfred E. Smith, a master of the art of politics, four times Governor of New York, an honest, courageous, and competent public servant. Not since 1916 had the parties presented candidates of their standing and experience, and the people responded by taking great interest in the campaign. Business interests for the most part gave support to the Republican ticket, hoping for a continuation of prosperity. The Drys were decidedly on the side of Hoover, as were the anti-Tammany element and the majority of ardent Protestants. Smith unsuccessfully appealed to the farmers on the strength of what the Republicans had not done for their relief and with the promise that a Democratic administration would give them better attention. He was more successful in reaching labor, the Wet element, and some Progressives; but he received less than 41 per cent of the country's vote. Hoover carried every state in the Union except Massachusetts and Rhode Island in the East, and Alabama, Arkansas, Georgia, Louisiana, Mississippi, and South Carolina in the "solid" South.

The New Deal Democrats. Elected by a large majority of popular votes in 1928, Hoover was repudiated by a somewhat larger majority in 1932.³ Roosevelt received even more electoral votes (472) than Hoover had received four years earlier. Hoover carried only Maine, New Hampshire, Vermont, Connecticut, Delaware, and Pennsylvania, receiving a total of 59 electoral votes. In the campaign something was said about the tariff, farm relief, Prohibition, power regulation, and a few other problems; but the real issue was the Depression. The voters decided that the party whose theme song in 1928 was "Prosperity" had no claim to power in the face of nation-wide distress. Roosevelt's handling of the banking

³ The popular vote in 1928 was Hoover, 21,392,190; Smith, 15,016,443. In 1932 Roosevelt's vote was 22,813,786; Hoover's, 15,759,266.

crisis of March, 1933, his domination of Congress, his huge spendings for relief, his willingness to experiment, and other significant features of his administration are fresh in our minds. The congressional election of 1934 amounted to a referendum on his program and the result left no doubt that the great majority of the people were with the President. There was no question of his renomination in 1936. Searching about for a candidate with a liberal stamp and one who could win back the farmers of the Central West to the Republican party, Republican leaders picked Governor Alfred M. Landon, a man who was unknown outside of Kansas until a few months before he was nominated for the presidency. The unbalanced budget, the mounting national debt, waste in relief, civil service abuses, and (near the end of the campaign) the Social Security Act were the chief points of the Republican attack on Roosevelt. The President campaigned on his record, and made no specific promises for the future. Farmers, laborers, those on relief, poor people generally, including the Negroes, about half of the Communists, more than half of the Socialists, and a goodly number of citizens from nearly all other groups were convinced that the President was the best choice. The chief opposition came from about 70 per cent of the newspapers, perhaps a larger percentage of the country's business and industrial leaders, regular Republicans, and a few former leaders of the Democratic party, including Alfred E. Smith, John W. Davis, and James A. Reed. Dr. Townsend boasted of 10,000,000 followers ready to do his bidding; Father Coughlin said he could reach 9,000,000 over the air; Minister Smith numbered his Share-Our-Wealth flock at 6,000,000. Of course there were some duplications in these figures, but the triumvirate's Union party candidate, William Lemke, polled only 892,793 votes. Landon received 16,682,524 popular votes, but carried only Maine and Vermont with eight electoral votes. Roosevelt's "political Johnstown flood" netted him 27,752,309 popular votes and 523 electoral votes.

ABORTIVE REFORMS AND "PURGES." With two great presidential victories and three smashing successes in congressional elections, President Roosevelt proposed that the Supreme Court of the United States be organized in such a manner that it would be unlikely to nullify much more New Deal legislation (See Chapter 16, section V). This measure aroused a storm of protest, and it was defeated in the Senate. Turning to the problem of administrative organization, he proposed a bill which would give him the widest powers in bringing about fundamental changes. Here again he met with strong opposition and violent denunciation, and his proposal was defeated in the House of Representatives. Trouble in the internal organization of the T.V.A. and a business recession were among the other factors which made rough sailing for the President. In the great legislative battles which the President lost a number of Democratic congressmen had opposed him, had associated themselves with "economic royalists," had

gone over to the enemy. Some of these anti-New Deal Democrats the President attempted to "purge" from the party in the primaries of 1938. The attempted purge aroused bitter resentment and must be written down as another presidential failure. It did not prove that the people had repudiated the President, but it did prove that they were unwilling to make dead politicians of public men, simply because they had incurred his disfavor. The congressional election in November, 1938, was another setback for the President and the New Deal. It is true that the Democrats still retained substantial majorities in both Houses of Congress, but the trend toward the Republican party was strong enough to be significant.

A TRADITION SHATTERED. A strong foreign policy of "standing up to" the dictators gave the President a new hold on the people and Congress. Yet it was reported that President Roosevelt had on more than one occasion privately stated that he would not be a candidate for a third term. He did not, however, make use of one of William T. Sherman's less familiar statements—"I will not accept if nominated and will not serve if elected." The President did not say that he would take to the hills if drafted by his party. The President probably refused to commit himself for a variety of reasons: the uncertain international situation and the desire to accept renomination should it continue to be critical, and the determination to control the Democratic convention and name his successor, if he should be ready for a successor in 1940. New Dealers in Washington and Democratic officeholders throughout the country backed the third term movement. As the international situation became critical and then catastrophic, and as the President moved with dispatch and decision to meet new situations, a strong rank and file approval of the third term seemed evident. The President's "loud silence" on his plans prevented the development of any strong support for other candidates. Consequently, when the convention met, it could do nothing but nominate Roosevelt. Not only did the President win the nomination for himself, but he also forced the convention to name for the vice presidency Henry Wallace, an ardent and philosophical New Dealer. Conservative delegates gnashed their teeth, but they could not prevent the nomination of Wallace. The purge which the President had lost in 1938 he won by slightly different means in 1940.

One of the most remarkable political events of our time was the nomination of Wendell Willkie for the presidency of the United States. The Republican nomination had been actively sought by Prosecutor Thomas E. Dewey, Senators Robert A. Taft and Arthur H. Vandenburg, Publisher Frank E. Gannett, and others. All of these men had been leaders in Republican politics. Some of them had been seeking the presidential nomination for several years, others for months. Until late in the spring of 1940 Dewey appeared to be the popular favorite, but Taft was, and continued to be, the choice of the entrenched leaders of the party. There was no certainty as to who would get the nomination and there were guesses

and shrewd prophecies regarding "dark horses." One thing was certain: few people were thinking that Willkie ought to be President; still fewer were thinking that he could be nominated; and practically no politician could conceive of him as a candidate. A Democrat who had voted for Roosevelt in 1932, a progressive who was saying, even in 1940, that much of the New Deal was here to stay, an "internationalist" who supported the President's foreign policies, a man who had never held any political office, a big business executive in the utilities industry with close Wall Street associations, straightforward, independent, and brilliant, Willkie was the organization man's last bet for the presidency. But less than two months before the nomination was to be made a number of political amateurs got behind Willkie. Events were on their side. The alarming advance of the dictators meant that America must prepare herself for any eventuality, caused politics to appear unimportant, and emphasized the need for an articulate leader, a capable organizer, and a cheerful but determined fighter. The rank and file of Republicans saw in Willkie such a man. His boom grew with amazing rapidity, although the established political leaders were just beginning to take it seriously when the convention convened. But the miracle happened. The people took possession of Philadelphia and the convention, shouting, "We want Willkie." To be sure, all of this may not have been quite as spontaneous as it appeared to be, for Willkie did have support from some politicians of experience, even experience in high-pressure salesmanship. Nevertheless, it was amazing. The type of men who usually boss conventions lost control of their delegates, and Willkie crashed over on the sixth ballot.

The great question before the American people seems not to have been the third term issue. Nor did the issue appear to be on national defense policy, for the two candidates were in substantial agreement on that. The only big question seems to have been: Which of the two candidates is the better qualified by ability, experience, and temperament to direct the defense program? The voters' answer was: Willkie, 22,327,226 (82 electoral votes); Roosevelt, 27,241,939 (449 electoral votes).

Then came lend-lease and other forms of aid to Britain and Russia. Then the war came to our own doors, almost crashing in our doors. We suffered heavy casualties and defeats. The nation had to begin to pull in its belt, to accept rationing. Millions were drafted for military service, and perhaps as many millions moved into war production areas. In 1942 the accumulation of resentments over the conduct of the war and rationing, the absence of young men in the armed forces, and the shift of workers to new areas may have been sufficient to cause the Democratic majority in Congress to be reduced almost to the vanishing point. Or the strong Republican gains in that year may have been an indication of genuine Republican strength. Time will tell.

II. MINOR PARTIES ⁴

In the last section some attention was given to the Populist party and to the Roosevelt and La Follette Progressive movements. Space does not permit a discussion of the numerous third parties and revolting factions; but the strongest of the third parties, the Socialist, must have brief mention. Also, we must raise the question as to what third parties in general have contributed to our political life, and offer some explanation of their failure to become serious contenders for national office.

The Socialist party. The Socialist Labor party, under the leadership of followers of Karl Marx, had an organization as early as 1877, but it did not put a presidential candidate into the field until 1892. It has always received a small number of votes, even for a third party. The Socialist party was organized in 1897 under the leadership of Debs, who headed the party ticket in five presidential campaigns, receiving 919,799 votes in 1920 while he was confined in a federal prison. Measured by Marxian standards, this party is moderate. In its platform for 1932 it proposed, among other things: the six-hour day and the five-day week; compulsory unemployment compensation based on contributions by the government and employers; old-age pensions; public ownership and democratic control of basic industries; very high inheritance and income taxes, especially upon large estates and incomes; a federal appropriation of \$10,000,000,000—one half for immediate relief of those in need, and one half for public works, slum clearance, and other purposes; socialization of the credit and currency systems; the abolition of the power of the Supreme Court to pass upon the constitutionality of legislation enacted by Congress; disarmament, by international agreement, if possible, but, if that is not possible, by our taking the lead; cancellation of war debts, provided such cancellation leads to disarmament; and the abandonment of military intervention in Central America or elsewhere.

The Socialist party put no candidates in the field in 1924, being content to support the Progressive ticket headed by La Follette. In 1928 Norman Thomas was nominated by the Socialists; but he was unable to impress the electorate at that time, receiving only about 268,000 votes. The situation was a bit different in 1932, however. The prolonged Depression, the uncertainty of the major parties as to the best methods for combating it, general disillusionment, and an increasing public appreciation of the ability and character of Thomas, all combined to put him in a favorable position. Taking full advantage of this, he traveled widely and spoke to large audiences, in which regular Socialists were usually in a decided minority. It was generally believed that Thomas would receive a large "protest" vote, 2,000,000 or more; but he received only 881,951 votes, fail-

⁴ Holcombe, *op. cit.*, Ch. XI; Key, *op. cit.*, Ch. X; Sait, *op. cit.*, Ch. XI; Woodburn, *op. cit.*, Ch. XII.

ing to equal the record set by Debs in 1920. Various explanations are made for Thomas's surprising failure; but perhaps the most plausible one is that many who would have voted for him otherwise, fearing a Hoover victory and knowing that Thomas could not possibly be elected, decided to be content for the time being with the reputed liberalism of Roosevelt. In 1936 the right wing of the Socialist party supported Roosevelt. Thomas held the left wing but received a relatively insignificant vote—187,342. In 1940 Thomas received only 117,000 votes.

The contribution of minor parties. These dissident minor parties do not merit the contempt that many people accord them. The Liberty party took enough votes from Clay to give Polk New York and the presidency in 1844; the Free Soil party in the same state took enough votes from Cass to place Taylor in the White House in 1848; and everyone knows that Theodore Roosevelt's forces made Wilson's election possible in 1912.⁵ We must not assume, however, that third parties are frequently in this strategic position, as is illustrated by the fact that neither the relatively high vote of the Populists in 1892 nor the vote of the Progressives in 1924 proved to be deciding factors.⁶

It is in bringing forward new issues, or issues which the major parties will not emphasize for fear of alienating voters, that third parties make their chief contribution. Thus, the Liberty and Free Soil parties boldly attacked the slavery evil; the Prohibition party, the liquor question; and the Populists, the La Follette Progressives, and the Socialists, various economic and social problems. Many principles advocated by third parties have been adopted by one or both of the major parties and later enacted into law. The major parties are interested in victory at the polls. They are interested in principles, not so much for principles' sake, but as means of attracting voters. New principles, being likely to repel voters, must be avoided, or at least approached with great circumspection. The third party can concentrate on principles, since it has no hope of immediate victory in any case. The result is that many vital issues are presented by minor parties. If an issue thus presented proves popular, a major party may take it over, giving no thanks to the third party and showing no sense of shame. In 1896 the Democratic party adopted nearly all of the essential principles advocated by the Populist party, which had developed a considerable following in the South and West. It may be said that minor parties, without meaning to do it, send up "trial balloons" for the major parties. This is a splendid service for the country as a whole, but third parties have never reaped for it the reward of office.⁷

⁵ Minority parties may on occasion combine with a major party and produce decisive results. Thus, in 1941, La Guardia was elected Mayor of New York by 668,763 Republican votes and 434,297 American Labor party votes, the two parties combined giving him only 131,000 more votes than his Democratic opponent received.

⁶ *Sait, op. cit.*, pp. 301-302.

⁷ *Holcombe, op. cit.*, pp. 342 ff.

Why third parties have failed to become major parties: 1. POPULAR BELIEF IN THE TWO-PARTY SYSTEM. It is apparent from the last paragraph that one reason why third parties have never seriously rivaled the major parties is that the latter steal the former's principles. But the reasons for the failure of minor parties to gain national office merit further consideration.

The average American takes the two-party system as he does the daylight and the dark. Since he can remember, the only groups which have put up real fights are the Democrats and the Republicans. If he knows a little of party history, he knows that the battles raged in the earlier days of the Republic between the Jeffersonian Republicans (Democrats) and the Federalists; later on, between the Democrats and the Whigs; and, since 1856, between Democrats and Republicans. Our typical citizen knows, of course, that third or minor parties have come into being from time to time, and that on several occasions large aggregations of voters have left one or the other of the great parties and conducted independent campaigns; but he knows also that none of the third parties and none of the independents in revolt has ever won a national election. He has a sort of contempt for the "cranks" and "purists" who try to organize new parties and who never muster more than a few hundred thousand votes. He is very skeptical concerning the wisdom of a revolt from one of the major parties, for he sees that all that it has ever accomplished is to secure the election of the candidates of the other major party. He feels somehow that nature produced two parties; that an additional party would be a political monstrosity. As a matter of fact, the division of the voters into two rival camps is peculiar to English-speaking countries. The democratic nations of Continental Europe have from six to fourteen parties, no one of them commanding anywhere near a majority of the votes.

2. THE DESIRE TO MAKE ONE'S VOTE COUNT. When a major party fails to conform to a voter's ideals, he prefers to remain with it in the hope that it will improve, rather than to affiliate himself with some third group and "throw his vote away." If the voter leaves his party, he is likely to go over to the other major party, thus "saving" his vote.⁸

3. EASY TESTS OF PARTY. The leading parties themselves make it easy for the voter to remain with them by frequently neglecting to take a position on an issue which would alienate voters, or by resorting to ambiguous language on such issues. The Republican platform of 1932 frankly declared that, since members of the party held different views on Prohibition, "no public official or member of the party should be pledged or forced to choose between his party affiliations and his honest convictions upon this question." In general, it may be said that the typical citizen is usually neither hot nor cold on specific public questions; in normal times, at least,

⁸ This was particularly noticeable in 1932 and 1936, when Republicans by the million left their party and voted, not for Thomas, but for Roosevelt.

he is satisfied with the spirit and traditions of his party and he feels that "everything will be all right."

4. LACK OF OUTSTANDING POLITICAL LEADERS FOR THIRD PARTIES. Capable men who might lead a third group usually belong to one of the standard parties, and renunciation of the original party is likely to mean an end of their chance for political advancement. Or, in common with the rank and file of voters, they may be convinced of the futility of third-party movements. Thus, Dry Senator Borah, although he denounced the Republican party's modification plank, promptly declined to carry the Prohibition banner in 1932; and Senator Norris earlier refused to heed the call of John Dewey to lead a new progressive party, although Norris, until 1936 a nominal Republican, supported Smith in 1928 and Roosevelt thereafter.

III. PARTY ORGANIZATION ⁹

The necessity for organization. In the earlier days, party organization was not so important; but with the extension of the suffrage, the rapid increase in the number of elective officers, and the growing complexities of government, the party found that only the most complete organization could serve its needs. How could the party form policies, adopt platforms, nominate and elect candidates to office, raise and expend large sums of money for campaign purposes, appeal to each voter, distribute patronage, act as a social welfare organization, and do all the other things it does in nation, state, county, and city, without the most complete organization?

Temporary character of conventions and primaries; permanence of committees. Probably the best-known party institution is the convention, and close to it in the popular mind is the primary election.¹⁰ Conventions, whether local, state, or national, have to do with the drafting and adoption of platforms and the nomination of candidates, while in the primaries only the latter function is performed. The convention is composed of representatives who act for the party, while the primary is the whole body of party members acting for themselves. Since conventions meet only for a brief period preceding elections, and primaries are equally temporary and intermittent, it is clear that, however sovereign they may be, they are not the organs which keep the party running.¹¹ From what we have already learned of the party, we know that it must ever be on the alert in order to fulfill its many functions. The necessary ceaseless activity of the party is performed by permanent committees, a hierarchy of committees, one for each political unit from the precinct to the nation.

The national committee. At the head of the party committee system

⁹ Brooks, *op. cit.*, Ch. VIII; Key, *op. cit.*, Ch. XI; E. B. Logan, (Ed.), *The American Political Scene* (1936), Ch. II; C. E. Merriam and H. F. Gosnell, *The American Party System* (1940 ed.), Ch. VII; Sait, *op. cit.*, Chs. XII-XV.

¹⁰ For fuller discussion of conventions and primaries, see the chapter on "Nominations."

¹¹ Brooks, *op. cit.*, pp. 156-157.

is the national committee, composed in both the major parties of a man and a woman from each state and territory. These committees serve for four years, and the delegates of each state or territory at the national convention usually choose their own committeemen, although they may be elected in state primaries or picked by state conventions. The chairman of the committee is named by the party's presidential candidate. The powers and duties of the committee are to fix the time and place for holding the national convention; to decide how the delegates to the convention shall be apportioned among the states; to recommend its temporary officers and make up the temporary roll; and to take the lead in conducting the presidential campaign. In the event of a party victory, members of the committee will have considerable influence in recommending appointments. In any case, the committee has considerable responsibility in looking after the party's interests during the relatively quiet years which follow an election and in preparing for the next campaign.¹²

CONGRESSIONAL COMMITTEES. Both parties have a congressional committee and a senatorial committee. The Republican congressional committee is composed of a member from each state which has a Republican in the House. The Democratic committee is the same in composition, with the exception that the chairman is empowered to name a woman member from each state and to appoint a member from any state which has no Democratic representation in the House. The principal interest of these committees is to secure the election of members of the party to the House of Representatives. To this end, they are very active in the biennial congressional elections, particularly in election years when there is no presidential election. The Democratic and Republican senatorial committees are composed of six and seven members respectively, and their chief concern is, of course, with senatorial elections. While the congressional and senatorial committees have no formal connection with the national committees, they are bound to them by partisan interests, they look to them in particular for financial aid, and are quite likely to be rather completely overshadowed by them in presidential election years.

STATE COMMITTEES. At the head of a state party organization is the state central committee, composed of members chosen by direct primary, by committees of various districts of the state, or by the state convention, and varying in membership from ten or twelve in some states to several hundred in others. These committees are charged by law with certain responsibilities in respect to primaries and conventions. In some of the Southern states they may fix the qualifications for voters in the primary elections—a very important power, since the primary is really the election in a number of these solidly Democratic states. In all the states the committees may fill vacancies caused by the death or withdrawal of candidates

¹² The work of the national committee will be more fully discussed in the chapters on "Nominations" and "Elections."

for state office. It is, of course, in connection with the state campaigns that the committee, its operations directed by a chairman, makes its most determined efforts. It heals factional quarrels, determines the tactics to be followed, after consultation with the leading candidates, raises and spends money, sends out speakers, distributes "literature," and what not. The national committee has considerable influence over the state organizations at all times, but especially in presidential years. Co-operation between the two organizations is mutually advantageous; for success or failure in one unit nearly always vitally affects the other. The state committee attempts to secure co-operation among other party committees, such as the district and county committees; but unless the state has a very definitely recognized party leader, the relations of the various committees are not likely to be entirely harmonious.

LOCAL COMMITTEES. There are a number of local committees, varying considerably in the states; but those commonly found are county, city, ward, town, and precinct committees. They are chosen by the voters in many jurisdictions; but in others they are chosen by conventions or they are appointed by individual party workers of higher rank. It has just been explained that the state committees usually have no very definite control over the local committees, and it is generally true that the higher local committees have little authority over the lower ones. The local organizations promote the interests of their party in the various local areas by calling conventions, conducting primaries, distributing patronage, and looking after the needs of the voters in a more direct manner than is possible for the national and state committees. Some urban organizations, of which Tammany Hall is the best illustration, have sufficient discipline and power to control at times the state party organization.

THE PRECINCT COMMITTEEMAN. The strength of organization is determined in a large measure by the structure and activities of their smallest units; for these units alone are able to reach every individual directly. The smallest political unit is the precinct, of which there are approximately 125,000. Each of the great parties has an organization in practically every precinct, and the minor parties are active in many of them. The head of the precinct organization is the precinct committeeman (frequently called "captain" or "leader"), with whom is often associated a woman. Other workers may assist, who, according to Merriam and Gosnell, bring the number of active local partisans above the million mark around election time.¹⁸ The precinct committeeman works 365 days in the year. He helps newcomers to get settled in the neighborhood; befriends the poor; "sees" police officers and judges on behalf of those who have been careless about law observance; finds jobs for those who want them; secures innumerable favors from the government for practically every class in his precinct; looks after the naturalization of foreigners;

¹⁸ *Op. cit.*, p. 146.

keeps after voters until they register; and delivers the votes to the "organization" in the primaries and to the party at the regular elections. It is obvious that the last-mentioned function is his most important one and that his other activities are incidental to it. If he fails in this, he fails as committeeman and his place is taken by another. If he succeeds notably, his "organization" is pretty sure to advance him. Mr. Farley's estimate that Roosevelt would carry every state except Maine and Vermont in 1936 was more than just a lucky guess. He had reports every day based upon the reports of tens of thousands of precinct workers.

Plunkitt's start. Many a man has started in politics through small beginnings in his precinct. "I set out when I cast my first vote to win fame and money in New York city politics," said Plunkitt of Tammany Hall. "Did I offer my services to the district leader as a stump speaker? Not much. The woods are always full of speakers. Did I get up a book on municipal government and show it to the leader? I wasn't such a fool. What I did was to get some marketable goods before goin' to the leader. What do I mean by marketable goods? Let me tell you: I had a cousin, a young man who didn't take any particular interest in politics. I went to him and said: 'Tommy, I'm goin' to be a politician, and I want to get a followin'; can I count on you?' He said: 'Sure, George.' . . . That was beginnin' business in a small way, wasn't it? But that is the only way to become a real lastin' statesman. I soon branched out. Two young men in the flat next to mine were school friends. . . . They agreed to stand by me. Then I had a followin' of three voters and I began to get a bit chesty. Whenever I dropped into district headquarters, everybody shook hands with me, and the leader one day honored me by lightin' a match for my cigar. And so it went on like a snowball rollin' down hill. . . . Before long I had sixty men back of me . . . and so on up and up until I became a statesman," concluded the self-styled "honest grafter."¹⁴

IV. PARTY LEADERSHIP¹⁵

Although a great deal of leadership is furnished by the various committees and committeemen discussed in the preceding section, these by no means represent the whole directing force of the party. Presidents, governors, congressmen, local officeholders of almost every conceivable type, and those who have no office and no place on a party committee are potent factors in shaping the policies, conducting the campaigns, and fixing the destiny of the party.

Leadership of the President. By virtue of his position, the President is

¹⁴ W. L. Riordon, *Plunkitt of Tammany Hall* (1905), pp. 14-17. By courtesy of Doubleday, Doran and Company, Inc.

¹⁵ Brooks, *op. cit.*, Ch. IX; Merriam and Gosnell, *op. cit.*, pp. 153-184; W. B. Munro, *Personality in Politics* (1934); Sait, *op. cit.*, Chs. XIV-XVII.

usually the leader of his party. Of course the degree to which the President may control his party varies in accordance with such factors as his inclination and capacity for leadership, the number of other national and state party leaders, and the extent to which his party is in control of the legislative branch of the government. In any case, the President is a power in the party on account of the prestige of his position as Chief Executive. He is the leader of the nation as well as the leader of his party. An open repudiation of the President invites defeat for the party in a national election, and is quite likely to jeopardize party success in state and local campaigns. Local candidates of the President's party make every effort to secure his good wishes and to spread the word around that they are endorsed by the nation's Chief. Mayor Carter H. Harrison I, an able executive and probably the most astute politician who has ever been mayor of Chicago, was simply illustrating his political wisdom when, upon his nomination for his fourth term as mayor, he asked President Cleveland to wire him his congratulations.¹⁶

Leadership comes to the President also through his wide appointing power. Congressmen frequently find that they must follow the President, or allow their friends and supporters to go without jobs which are within the gift of the Great Chief. Likewise, state and local party organizations are very chary of incurring the President's displeasure because appointment to federal office is a reward for which many a party worker aspires.

Again, presidential leadership is evidenced in the presentation of issues. The President's position as head of the nation and the almost unlimited publicity he receives, enable him not only to appeal directly to the rank and file of his party but to the whole people. A wise President can determine a number of issues for his party and practically force the other party to meet him on these issues. If he has followed a constructive program in office, he and his party will reap the reward for this in securing the votes of many independents in the next election. It is obvious that the party with the President has a big advantage in leadership. Leadership in the opposition party is usually uncertain and divided. A defeated presidential candidate usually retains only a nominal leadership during the ensuing four years. Said Henry Watterson of Cleveland, after his defeat in 1888: He "reminds one of a stone thrown into a river. There is a 'plunk,' a splash, and then silence."¹⁷ Of course Cleveland "came back" in 1892. We should add also that Bryan, in spite of his three defeats, was a power in the Democratic party for a generation, and that Smith retained a large following for several years after his defeat in 1928.

Leadership of other officeholders. Elective officers other than the President frequently stand high in party councils. Members of either House

¹⁶ C. O. Johnson, *Carter H. Harrison I: Political Leader* (1928), p. 154.

¹⁷ Quoted in Sait, *op. cit.*, p. 379.

of Congress furnish a large part of the leadership for the party out of power, and the President must usually share leadership with members of his party who hold seats in Congress. On occasion, representatives and senators of the President's party have transferred the center of activity from the White House to the Capitol. The House of Representatives has contained such leaders as Blaine, Garfield, McKinley, Reed, and Clark. The Senate list is much longer, and we mention only Sherman, Depew, Allison, Johnson, Underwood, and Borah. Governors are frequently leaders in the states; but the brevity of their terms (usually two years), the law or custom in a number of states against re-eligibility, and their detachment from national affairs, all tend to lessen their opportunities for leadership. A United States senator is under none of these handicaps. Consequently, one of the familiar sights in American politics is a senator leading or bossing the party in his state. Yet the position of governor is one with excellent political opportunity, for a number of governors have become President and many have become senators. Various other officeholders, state and local, through perfecting combinations, aggressive leadership, or efficient discharge of duties, may become important factors in directing the party in their own or wider areas. The greater number of our state and national leaders have had their start in these minor offices. The local units are to a considerable extent the proving ground for those who have higher political aspirations.¹⁸

Unofficial leadership. Party control is by no means the exclusive possession of those who hold official positions in the party or public office. Bryan, holding no office of any kind, was the leading spirit in the Democratic party during the greater part of the period from 1896 to 1912. In office or out, many of our public men wield an important influence. Great journalists, leaders in commerce and industry, indeed, men from practically every calling, are numbered among those who shape party policy and interpret it to their own circle or to the people as a whole.¹⁹

The boss. Some leaders who dominate the party in a state, county, or city, and who are considered not overly scrupulous in their methods, are called bosses. It is not easy, perhaps impossible, to distinguish between a boss and a leader; for the boss is simply a type of leader, and a great deal of his technique is similar to that of the leader. Bosses are supposed to rule by secret and corrupt means; to employ violence and trickery; to strive for power for its own sake or for financial profit; and to make no moral or intellectual appeal to the voters.²⁰ But there are bosses and bosses. Some are certainly not personally corrupt or violent; others on occasion make a moral or intellectual appeal. Many of them may "work for their own pockets all the time"; but others hold the place because they enjoy the

¹⁸ Merriam and Gosnell, *op. cit.*, pp. 156 ff.

¹⁹ *Ibid.*, pp. 161-162.

²⁰ Summary of Roosevelt's and Stanwood's observations in Sait, *op. cit.*, pp. 415-416.

eminence of their position—love to “see themselves pass by.” Yet it is fair to say that some leaders have several of the unethical characteristics mentioned above and that the term “boss” as used in common parlance may be appropriately applied to them. A number of explanations have been offered for the existence of the boss, of which the most significant is that our complicated constitutional systems, with their diffusions of power, their many elective officers, their provisions for short terms of office, have left us in great need of some more permanent central and controlling authority. The boss is such an authority.

EXAMPLES OF BOSSES. From a long list of bosses, let us consider a few. Perhaps our most notorious boss was William M. Tweed of Tammany Hall, described as “a chairmaker by trade, a vulgar good fellow by nature, a politician by circumstances, a boss by evolution, and a grafter by choice.”²¹ Sixty years ago, he and his “ring” robbed the city of New York of millions. Tweed typifies the boss to the average man, but there are many other types. Senator Boies Penrose, a scholar and a “highbrow,” was the Republican boss in Pennsylvania from 1904 to 1921. George Brennan, coal miner, head of a bonding company, millionaire, loved the “great adventure,” the “thrill,” of politics, and, seemingly for no other reason, ran the Democratic party in Chicago and Illinois during the eight years preceding his death in 1928. The glum Charles F. Murphy, who was in the saloon business in a big way, exercised his superb executive talents as “leader” of Tammany Hall, and for some twenty years following 1902 had control of New York City, during a good part of which time he controlled the state as well. It is reported that he said to Governor Sulzer, who attempted to resist his power: “You are going to be governor? Like hell you are.”²² At Murphy’s behest, Sulzer, having continued to disobey the boss, was removed from office by impeachment. Rural communities and states are not, as is commonly assumed, always free from bosses or leaders of the boss type. North Dakota was for several years (1916–1921) under the rule of A. C. Townley, the skillful organizer and president of the Non-partisan League, an organization which received thousands of eighteen-dollar subscriptions from the farmers of the state. Whatever type the boss may be, he rules largely through his knowledge of human nature, his capacity as an organizer, his industry and tenacity, and through his power to dispense jobs and grant favors.

Perhaps the most conspicuous example of the old municipal boss who still survives is Mayor Frank (“I am the law”)²³ Hague of Jersey City. Until recently the undisputed boss of the Democratic party in his city and state, he was not much more than annoyed when the Supreme Court of the United States enjoined the enforcement of his ordinance which deprived

²¹ S. P. Orth, *The Boss and the Machine* (1919), p. 70.

²² G. Myers, *History of Tammany Hall* (1917 ed.), p. 368.

²³ Hague’s own words.

the C.I.O. and similar "radical" organizations of their civil rights in Jersey City.²⁴ The corner stone of Hague's power is his working understanding with industrial and financial interests, and in carrying out his part of the arrangement he must wage war against the C.I.O., the American Civil Liberties Union, and all other "radical" organizations. This gives him almost the unanimous support of the rank and file of "patriots" of practically every hue save red and pink. By no means insignificant is the political strength he receives as a result of his success in bringing millions in federal funds to his county, his W.P.A. ball park, his maternity hospital, and his generous personal gifts to the Roman Catholic Church. But the man Hague is the decisive factor—his will to rule through intrigue and fear.

A NEW TYPE OF BOSS. Some writers have risked making the statement that Hague is the last of the old municipal bosses. They say this not because the country has grown more righteous or because its civic conscience has been thoroughly aroused, but rather because new forces are at work. They see a shift in the bases of political power.²⁵ The long arm of the federal government now reaches into the cities from a number of angles. Not long ago Boss Pendergast of Kansas City was sent to the penitentiary for evading his federal income tax, a crime which has led to the downfall of a number of political crooks and private gangsters during the last decade. In recent years Tammany Hall has been far from the seat of power in New York City. The eclipse of Tammany may be attributed to a number of factors, but the growth of organized labor accompanied by an increase in its political power was not an insignificant factor. Furthermore, since 1933 relief has been largely in the hands of the federal government with the result that the petty charities through which Tammany endeared itself to the poor have lost much of their political value.

It may be premature to hold obsequies for the old municipal boss who ruled his city and sometimes his state through a careful cultivation of the friendship of all racial and religious groups, granting favors to business men in return for substantial contributions, and keeping the poor in line with Christmas baskets, sacks of coal, clam bakes, and marshmallow roasts; but it is doubtful if there is prematurity in the warning that new forces are developing a new type of boss, the boss who makes his appeal to old age pension organizations and other groups in quest of security. We may have to give our attention in the future to the demagogue-boss who comes forward as a "friend of the people" and promises "ham and eggs to all," or who would "share the wealth," and make "every man a king." The longing for security in an unstable world plays right into the hands of such a

²⁴ In 1941 Hague's iron grip on New Jersey was weakened somewhat by Governor Charles Edison who was able to put through a legislative program despite Hague's strenuous opposition. In 1943 he received a further setback through the defeat of his candidate for governor.

²⁵ Pendleton Herring, *The Politics of Democracy* (1940), pp. 138-139.

demagogue. To him people who had lost hope in other countries, encouraged by special interests, have surrendered their liberties and their right to think. The boss is the dictator in a totalitarian country. The late Senator and "Kingfish" Huey Long had many of the characteristics of such a boss. He had the brains, the will, the gift of oratory, the dramatic quality, and the ruthlessness of a dictator, and like all "good" dictators he constructed roads and erected magnificent public buildings for the people to enjoy. It is possible, however, that he had too much of a sense of humor for a dictator and that he was too wise to be able to convince himself that he had a divine mission to perform.

Concluding the section on leadership, we must observe that, despite the many sources from which control of the party may arise, we not infrequently look in vain for a recognized party leader. It was mentioned above that the party out of power usually has no national leader. In a number of the states neither leaders nor bosses seem to flourish, although they are quite likely to be found in industrial and urban states. As for the county, either urban or rural, it is estimated by Professor Sait that there is better than an even chance of the party's being under the leadership or domination of some individual.²⁶ It should be noted that leadership is often weakened or divided by the efforts of dissenters or reformers to break the power of those in control of the party unit and depose the leader—usually called a "boss" by the insurgents.

V. FUNCTIONS OF THE PARTY ²⁷

Authorities on political parties list their important functions about as follows: (1) the formulation of public policies; (2) the selection of official personnel; (3) the conduct or criticism of the government; (4) political education; (5) intermediation between the individual and his government; (6) the performance (in cities) of a type of social service; (7) the unification of the departments of government; and (8) the unification of the nation.

1. Formulates policies. Parties have their origin in principles and issues, and the party which does not add new ones to its program cannot hope to survive. Although the party's interest in the formulation of policies may be motivated primarily by the earnest desire for victory at the polls, it nevertheless performs a genuine public service in sifting the issues and presenting them to the people. For fear of the political consequences, parties have neglected important issues, such as woman's suffrage and Prohibition, and for the same reason they have spoken in uncertain language upon other public questions; but at times they have made clear declarations of policy, as the two leading parties did in 1896 when they stated opposite convictions on the money question, and again in 1920 when

²⁶ Sait, *op. cit.*, p. 412.

²⁷ Merriam and Gosnell, *op. cit.*, Ch. XIX; Bruce, *op. cit.*, Ch. II.

they differed on the League of Nations. Parties are most actively engaged in forming policies in the months preceding elections, but the process goes on in an abated form and less dramatically around the council tables of their leaders during the relatively quiet periods between elections. Let no one assume that parties present all the issues. It was just noted that parties are afraid to make issues of some questions; others they may take up half-heartedly; a few may escape their notice. Furthermore, since parties are national in character, they do not function actively in forming state policies and they are even less active in forming local policies. Many issues are consequently presented by other organizations, such as the Anti-Saloon League, the Civil Service Reform League, the American Protective Tariff League, labor and veterans' organizations, and others.

2. Selects official personnel. The chief interest of the party is in securing the election or appointment of its men to public office. Where two or three organization men are gathered together, especially if an election is in the offing, the conversation is likely to come to the question of available candidates for various elective offices. In official party councils, no other matters are considered with as much care. An individual is proposed as a candidate for a particular office. Immediately such questions as the following arise: Can he carry the Negro vote? Will he support the organization, or will he be too independent? How does he stand on public utilities? Possibly it will seem advisable to endorse him for the nomination, or it may be thought best to name him for a less conspicuous office, or he may be dropped from consideration for any elective post. In like manner, the party leaders are much concerned over filling the appointive offices. In some cases, elected officers who are supposed to make the appointments practically abdicate and allow the "organization" to name them; seldom, indeed, do the legal appointing authorities show decided independence in making appointments. We should add that where the merit system is in operation the influence of party in making appointments is limited, and that such influence is likewise limited in many local areas whose governments operate to some extent on the nonpartisan basis.

3. Conducts and criticizes the government. In general, it may be said that the majority party conducts the government. We should bear in mind, however, that many public matters are nonpartisan or bipartisan in character; that party plays a diminishing part in government as we proceed from the nation to the state and local government; and that even in the national government the President and a majority of the Senate and the House of Representatives are not of the same party much more than half the time. Yet the party with the majority of the offices of a government is primarily responsible for the conduct of that government, while the other party is primarily the critic of the party in power. The former "points with pride" to its achievements in office and asks to be retained in office on its accomplishments; the latter "views with alarm" the alleged sub-

servience of its office-holding rival to this or that, its "saturnalia of corruption," and all the rest. There is a lot of sham to the claims and counterclaims, charges and countercharges of the parties; but the fact remains that one party does carry out many of the important functions of government, while the other supplies the almost equally important public service of careful and constant scrutiny of its rival's stewardship. Criticism of the government is, of course, not the exclusive privilege of the party out of power; various organizations and individuals frequently make loud and well-founded complaints, and sometimes there is an outcry against both parties.

4. **Contributes to political education.** The schools, the press, the forum, and other agencies contribute very substantially to the cause of political education; but the political party is the most inclusive, continuous, and probably the most effective institution in arousing and holding the interest of the people in public affairs. To be sure, much of the material released by the party is not of any great value in advancing a desirable type of political wisdom. The party, or influential members of it, may appeal to the religious sentiment, class prejudice, or race hatred of a group—types of appeal which are clearly pernicious. But, on the other hand, honest and courageous leaders, of whom we have a goodly number despite the sweeping declarations of cynics to the contrary, have a powerful influence in inspiring, elevating, and educating the voter. Who can calculate the effect of the addresses and public conduct of such men as Wilson, Hughes, Hoover, Smith, and the second Roosevelt, five of our ablest leaders! Men of this type have the nation for their audience and following; while the artifices of the demagogue, however clever, are seldom effective beyond his local community, although they may give him national and even international notoriety.

5. **Serves as intermediary between the citizens and the government.** Governments are somewhat impersonal; perhaps a little cold and unsympathetic. Furthermore, their intricacies are beyond the ken of the great majority. The honest and the dishonest, the worthy and the unworthy, the rich and the poor, frequently feel the need of a mediator in their relations with the government of the nation, state, or city. If an oil baron wants a valuable government lease, if a manufacturer thinks his establishment is assessed too high, if a widow has a claim against the government, if a millionaire's son is in difficulties for reckless driving, if a pushcart peddler is being annoyed by police, the individuals concerned are likely to seek an interview with a man who has standing with the party in power and, hence, influence with the government. In the days when William M. Tweed held New York City in the palm of his hand, Judge Barnard asked a candidate for admission to the bar how he would proceed if he had a claim of \$50,000 against the city. "I'd see Bill Tweed," replied the can-

didate, who understood fully the process we are here discussing.²⁸ It is obvious that party men acting as go-betweens and buffers may be honestly performing a worthy service, or they may be aiding and abetting unscrupulous persons and out-and-out crooks. At any rate, they perform a service which is well-nigh indispensable, governments and human nature being what they are.

6. Dispenses social service. Not only does the party organization serve as an intermediary between the citizen and his government, but it performs many direct social services. This is especially true of municipal party organizations. Party workers visit and send doctors to the sick, secure employment for those who want work, provide temporary shelter for poor families who have been burned out, promote athletics in their neighborhood, give picnics, establish clubs, and in various other ways meet the social needs of the rank and file of citizens. It is to be observed, however, that government agencies for employment, social security, and relief are now performing a number of the services which in the days of "rugged individualism" were assumed by political organizations and private charity. Yet the city party worker may still find useful the methods of George Washington Plunkitt. Some forty years ago he listed a typical day's activities as follows: furnished bail for a saloon keeper who had been arrested for violating the excise law; secured the discharge of four of six "drunks" by a timely word with the judge, and paid the fines for the others; arranged for temporary quarters for several families who had been burned out; paid the rent of a poor family and gave them a dollar for food; spent nearly three hours in finding jobs for four men, but succeeded in each case; attended the funeral of an Italian and hurried back to appear at the funeral of a Jewish constituent; presided over a meeting of district captains who reported on voters who were in need or in trouble; went to a church fair—took chances on everything, bought ice cream for the girls, and took their fathers out for liquid refreshments at the corner; bought tickets for a baseball game between two teams in the district; spent ten dollars on tickets for a church excursion; graced a wedding reception with his presence, having previously sent a handsome present to the bride.²⁹

7. Helps unify the government. In addition to the more or less direct functions which we have mentioned, the party may be said to perform certain incidental functions. The party is a unifying agency in the government.³⁰ It partially breaks down the somewhat artificial "separation of powers," and to some extent gives a uniform program and concerted action to the executive and legislative branches. This process is most obvious when an executive endowed with qualities of leadership secures

²⁸ Sait, *op. cit.*, p. 429.

²⁹ New York Times, November 23, 1924, sec. 9, p. 3.

³⁰ Bruce, *op. cit.*, pp. 39-41.

the enactment of a constructive program by legislative bodies in which his party has majority membership. Doubtless, a Cabinet member was thinking wishfully of the unifying power and the smooth driving force of a properly functioning party when he said that he (a Republican) "would rather be in hell without a fan than Secretary of the Interior with a Democratic House of Representatives."

8. Operates as a nationalizing agency. "This great and glorious country was built up by political parties," declared the irrepressible Plunkitt in his "sillygism" on patronage.³¹ We must, of course, modify this statement; but it may certainly be said that parties, along with such agencies as wars, improved communications, schools, and churches, have made us a nation.³² Parties have lessened the disintegrating force of sectionalism. They have made national appeals from the beginning; even the Jeffersonian Democrats, preaching the gospel of states' rights, perforce addressed their message to the entire country. As parties have developed their histories and traditions, sentiment for them has increased. The average citizen has a love for his party somewhat akin to his love for his country; his loyalty to his party is a close second to his patriotism. It is not surprising, therefore, that party faith usually brings about a measure of harmony between sections of the country which have quite dissimilar economic and social interests. The farmer of the West may at least co-operate with the industrialist of the East in securing the election of Republicans to office, and the courtly Southerner will found his Democratic hopes on an alliance with a lowly urbanite of New York or Boston. The unifying tendency of parties, with their members and organizations in practically every community, would seem to be almost axiomatic. It is very significant that, in the years preceding the Civil War, the party ties remained unbroken until some time after several of the Protestant churches had split into Northern and Southern branches: and it is equally noteworthy that parties were among the first institutions to be renationalized at the conclusion of the struggle.³³ We should not attribute any particular virtue to the party for its national scope; for party expediency necessitates an appeal to the whole people.

VI. PRESSURE GROUPS AND PROPAGANDA ³⁴

However significant the party's function in conducting the government may be, there are many other organizations or groups which participate in

³¹ Quoted in Sait, *op. cit.*, p. 450.

³² Merriam and Gosnell, *op. cit.*, pp. 431-433; Bruce, *op. cit.*, pp. 49 ff.

³³ We should note, however, that the Civil War and the Reconstruction policy of the Republican party long prevented that group from gaining a substantial foothold in the South.

³⁴ *Annals of the American Academy of Political and Social Science*, May, 1935; Mary E. Dillon, "Pressure Groups," *Am. Pol. Sci. Rev.*, XXXVI, 471 (June, 1942); L. W. Doob,

the governing process. Every unit of government (the judiciary to a lesser extent than the others) and the party itself is subject to constant request, entreaty, and threat from the very widest variety of interested groups, each seeking to make its own particular program or issue a government policy. Our total of laws and the degree of law enforcement we enjoy are largely the result of these conflicting pressures. The laws of physics are not the laws of politics in any strict sense, but an analogy is suggestive. If north and east exert equal pressure on a light object, it will move southwest. If east and west exert equal pressures, there is no movement, but a new pressure from the north will send the object south. Regardless of the number and direction of the pulls and pressures, the mathematical physicist can calculate to an exact degree the direction the object will move. We have the pulls and pressures in politics as in physics, but they are economic and social forces, not physical forces. We can see many of them at work, but we have not yet found a means of measuring them with scientific exactitude. Our task is doubly difficult because the objects upon which these social forces play have ambitions, prejudices, consciences, and all the other attributes of man. Yet as we congratulate the physicist upon the simplicity of his problem, we must seek to solve our own. Recent literature on the subject indicates that the psychologist and the political scientist are in quest of a solution.

Who applies the pressure. There are hundreds of groups, pushing, shoving, pressing, pulling, hauling, milling, and mauling in a grand scramble to control the government. No enumeration of them would be complete, nor is a listing necessary. A rough classification of them, based upon their objectives, with a few examples of each class will serve our purpose. At the top of the list we might place good government associations. Municipal voters' leagues have sought to improve the quality of city government, approaching the problem primarily from the angle of personnel, giving their endorsement to candidates of competence and integrity and seeking to accomplish the defeat of those lacking these qualities. Other organizations have sought to establish and improve the merit system in government. Of these organizations, the National Civil Service Reform League takes the highest rank, numbering among its past leaders George William Curtis, Theodore Roosevelt, and Woodrow Wilson, and among its achievements a large part of the credit for the progress of the merit system. There are organized groups to prevent war, such as the National Council for the Prevention of War; and there are groups which champion large armaments, such as the Navy League. The country has experienced the force of various organizations which concern themselves

Propaganda (1935); E. P. Herring, *Group Representation before Congress* (1929); Key, *op. cit.*, Chs. II-VIII; Logan, Ed., *The American Political Scene*, Ch. VI, by H. L. Childs (1936); P. H. Odegard and E. A. Helms, *American Politics* (1938), Chs. VIII-X, XXII; S. M. Rosen, *Political Processes* (1935); E. E. Schattschneider, *Politics, Pressure, and the Tariff* (1935). See Ch. 14, sec. vi, this work, on the lobby.

with the personal habits of citizens, the Anti-Saloon League easily winning chief recognition in this field. Not numerous as individuals, but powerful because of their array of talent, capitalists exert their pressures through the American Bankers Association, the Chamber of Commerce of the United States, and similar organizations. The Liberty League was such an organization, but its purpose was too obvious and its connection with great wealth too close to make it politically effective. Labor meets capital through the American Federation of Labor, John L. Lewis' Committee for Industrial Organization, and some independent unions. It may be that we shall see a labor party some day, but, except in 1924, organized labor has been content to support Democratic candidates for the presidency. The farmers have had numerous pressure organizations—the Grange, the Farmers' Alliance, and others. The American Farm Bureau Federation is the most powerful of the farm organizations at the present time.⁸⁵ Former soldiers can make very effective demonstrations of strength through such organizations as the American Legion and the Veterans of Foreign Wars. Civil service employees seek to make secure their tenure of office and to improve the conditions of their employment through the National Federation of Post-Office Clerks, the National Federation of Federal Employees and similar organizations, national, state, and local. In short, every group which has an objective which may be obtained in whole or in part through governmental action has an organization through which that action is sought.

Where the pressure is applied. Interested groups seek not only to control every unit of government, but also to bring under their influence the political parties and the party nominees for public office. Each pressure group, with varying degrees of energy and success, presents its program to political conventions, and makes every possible effort to bring about the nomination of candidates favorable to its cause. This activity is particularly noticeable at a national convention, and it is publicized in the great metropolitan dailies, but it goes on with equal intensity in policy-forming and nominating activities in small towns. During the election campaigns these groups busily occupy themselves with the task of keeping their candidates "right" on the issues and furnishing campaign support, often financial as well as oratorical and printed, to candidates who make the requisite promises. A powerful pressure group is often able to force candidates of both the leading parties to make a declaration favorable to its cause. This was a notable achievement of the Anti-Saloon League in state and congressional elections from about 1916 to 1930.

The organized group knows all about the "separation of powers" in our governmental structure, but there is no such separation of powers in the group's own organization. It works as a unit upon whatever organ or

⁸⁵ In January, 1943, it seems that this organization may be the most powerful of all pressure groups. No other group appears to have so much influence on Capitol Hill.

organs of the government it must influence in order to effectuate the group policy. It presses Congress, a state legislature, or a city council for legislation (Chapter 14, section VI), and it follows the statute or ordinance to the administrative departments and commissions charged with the duty of law enforcement. Of course, an organization often fights against the enactment of one law as assiduously as it champions the enactment of another, and it might endeavor to obstruct the operation of one law with an ingenuity equalled only by its zeal in urging the enforcement of another. Much of the time of the typical congressman is spent at the behest of groups and individuals, in urging administrative officers from the President down to "go easy" on enforcing some laws, to enforce others vigorously, to speed up the operation of some laws, to defer the date for others, to make exceptions in enforcement in certain cases, and so on. Here we see the congressman acting before an administrative department, unwittingly perhaps, in the capacity of agent for a pressure group.

The judicial arm of the government is not as much subject to pressure as the legislative and administrative departments, but there have been some notable controversies over the selection of judges. Many "right-thinking" people and organizations opposed (1916) the confirmation of Louis D. Brandeis as Associate Justice of the Supreme Court and almost succeeded in preventing it. Negro and labor organizations did prevent (1930) the confirmation of John J. Parker as Associate Justice. It may be that there are subtle group pressures exerted upon courts. One group may praise them as the bulwarks of our liberties, thereby indirectly thanking the judicial tribunals for having declared some "radical" legislation unconstitutional, and at the same time expressing the hope that they will strike down other and similar legislation. If that is a form of pressure, other groups exert it in like manner praising "liberal" judges who have broad social viewpoints and who write vigorous dissenting opinions.

But, after all, influencing the government is neither the beginning nor the end of the activities of the pressure groups. The government will not move far unless the public supports it. The thing for a pressure group to do, then, is to win the support of the public to its cause. The "public be damned" may still be the basis upon which some concerns act as they exploit that public, but every effort is made to conciliate the public, to "educate" it, to make the dose more palatable. Winning the public to this or that view of a business, a movement, or a cause is a function which yields handsome salaries to some of the best brains of the country. Legislative lobbying has been present in the American system of government since 1789, and it still goes on, but since the First World War the control of the minds of the masses has been given great emphasis.

How the pressure is applied. A few concrete cases will give us the best indication of the methods by which interested groups seek to win a favorable public and control government action. In the days preceding the

repeal of Prohibition, a leader of the Anti-Saloon League proposed this program for the Drys: *Educate* by sermons, lectures, dinners, dramatic debates, pageants, and print—tons of it; by moving pictures, the radio, press publicity, and by every other method of modern agitation. *Organize* local, county, state, and national committees and conventions to support all officials who are faithful to Prohibition. Everywhere recruit and enroll the voters; everywhere enlist and pledge the youth. Spread everywhere such creeds and slogans as "Obedience to law is liberty!" "The saloon must never come back!" *Finance* the League's program. The annual budget of \$650,000 of recent years must be increased to \$850,000. "We must have a stronger fighting front. . . . Re-elect Dry Congresses the next four years and a Dry President in 1932!"³⁶

Here is a brief digest of a report made by a publicity expert representing the sugar interests in their fight against a higher sugar tariff in 1929. He finally prevailed upon the *American Exporter's and Importer's Association* to pass strong resolutions which were very influential in newspaper discussions of the tariff. He induced John Barrett to prepare a statement which strongly influenced the resolutions favorable to the sugar people, which the *Foreign Trade Council* adopted. He persuaded the research director of the *Foreign Policy Association* to prepare a special bulletin on Cuba and the sugar tariff. It was at the sugar expert's suggestion that the *Chamber of Commerce of the State of New York* gave a special luncheon in honor of Cuban Independence Day, and by reference to his brief that it passed a resolution against the sugar tariff. Eventually he reached the *American Federation of Labor*, presenting to it material relative to child labor in the beet fields in the United States, material which prompted Mr. William Green to write a strong letter to Representative Frear. He induced a representative of *Time* to make a trip to Cuba and arranged for his reception. He managed to have audience with four of the principal executive officers of the *Federal Council of Churches* and interested them in his project of abolishing child labor in the American beet fields by securing the importation of sugar free of duty. When the House of Representatives fixed the sugar duty at 2.40 he distributed to 1,200 newspapers a *Consumer Story* "showing exactly how much the citizens of the town in which the paper is published would have to pay merely for the privilege of buying sugar." He arranged for Governor Smith "to come out at the proper time with a statement saying that the American people will not knowingly tax themselves further to increase the exploitation of child labor in the beet fields. . . . This plan is highly confidential." He reported that Senator Capper had been sounded out and that suitable articles were being prepared for his farm papers.³⁷ Notice how much of the activity of this publicity agent was directed at the public and how little

³⁶ *Lobby Investigation*, 1929-30, p. 4466.

³⁷ *Ibid.*, p. 1978.

of it was aimed directly at Congress, the tariff-making authority. This is the method of the twentieth century lobby, the lobby of propaganda—to persuade the public to bring influence to bear upon the government. Notice also how skillfully he used other organizations and pressure groups to promote the purpose of his own special sugar group.

Of the many handy illustrations of the specific application of pressure, we select two. When the Muscle Shoals question was before Congress in 1920, every member of the House of Representatives received a letter on the same day, the sort of letter that causes the more timid congressman to have cold chills and the best of them to think twice. It read:

"All competent and impartial inquirers have agreed that the Muscle Shoals project would result in greatly increased nitrate supplies and materially decrease costs. Hence the farmer as well as the consumer is intensely interested.

"It is evident to the farmer that the Muscle Shoals appropriation yesterday was defeated through the influence of large corporations who have a selfish interest in maintaining fertilizer costs.

"The American Farm Bureau Federation has a paid-up membership exceeding 1,500,000 active farmers. These farmers expect us to keep them informed on legislative matters.

"We regret that the vote yesterday was not one of record. In order that we may do justice both to Representatives in Congress and to our membership, will you kindly notify our Washington Representative Mr. Gray Silver, 1411 Pennsylvania Avenue—whether you voted for or against this proposition." The letter was signed by the president of the Farm Bureau.³⁸

"O God . . . thy enemies have made a noise," prayed Father Charles E. Coughlin, reciting over the radio the 83rd Psalm, with his interpolations, the night before the Senate took its vote on American membership in the World Court, in February, 1935. "They have said: Come and let us destroy them, so that they may not be a nation, and let the name of Israel (America) be remembered no more. For they have contrived with one consent: they have made a covenant (League of Nations) against thee." The Father urged his countless hearers to wire their Senators to vote against the Court. They wired with a vengeance. Fifty extra telegraph clerks had to be hired to receive the messages. The vote was taken; it stood 52 for and 36 against, seven votes short of the required two-thirds majority.³⁹ To be sure, there is no proof that the deluge of telegrams defeated the Court, but many competent observers in Washington believe that it did.

The press and propaganda. If the modern pressures are exerted on the masses as much as or more than upon governing authority, it is per-

³⁸ O. M. Kile, *The American Farm Bureau Movement* (1921), p. 173.

³⁹ *Time*, February 11, 1935.

tinent to mention the chief vehicles which convey the pressure to the public. Those vehicles are the newspapers and the radio. Newspapers are indispensable to the operation of a democracy; they give the news by which a people judge governmental policies. But they give both more and less than the news, and public conduct may be influenced by the omission of news and the coloring of news as well as by "pure" news. Of course, there is practically no such thing as news that does not contain some distortions, some bias. The reporter himself will have his peculiarity as an observer, his set of attitudes. He may seek out the sensational rather than the basic forces behind men and events. His story may be revised by a "re-write" man and pass through the hands of an editor. As finally printed it must conform to the policy of the newspaper, and even the greatest of our dailies have some very definite policies which may be detected in their news columns. Try as they may, the publishers of papers which print all the news "that's fit to print" do not thoroughly succeed in giving "simple news." The account of an event is bound to be shaped somewhat by every person who has anything to do with placing the story in the paper. Faults in physical perception, emotional responses, the hurry of getting news published, the desire to make a good story, and innumerable other influences will shade and color the news published by the most respectable press. When we come to consider newspapers other than the most respectable, there is hardly a pretense that the news is not distorted. The race to increase circulation, to secure and hold advertisers (the profit of the newspaper comes from this source), and the lust for power, political or otherwise, result in the grossest distortions of the news, sometimes in the total elimination of significant news items. Everyone understands that the editorial columns of a newspaper are given over to propaganda, much of it noble in motive, but not everyone realizes that there is much propaganda in the news columns as well. This propaganda in the news is largely unintentional with the more ethical papers, while with other papers, particularly with the "yellow" press, it is intentional. Yet in all fairness, it must be said that the American press comes as near giving unbiased news as the press of any other country in the world.

The influence of the press cannot be accurately estimated, although it is agreed on all sides that it is prodigious. The "yellow" press played a large part in bringing on the Spanish-American War and the press in the Allied Countries, not always scorning lies, shares a major part of the credit for keeping up the morale of the peoples of those countries during the First World War. Some reforms have been engineered largely by the press and some signal failures of the press to achieve attempted reforms must be recorded. In political campaigns the press may exercise its minimum influence. Time and time again city organizations have won elections in the face of practically unanimous press opposition. Without a doubt a factor, the press is certainly not a decisive factor in determining a national

election. At times we are tempted to think the political influence of the press is tremendous, but that is when the press happens to be on the political bandwagon, as in 1924. The influence of the press in 1936, when at least two thirds of it opposed Roosevelt, seemed to reach an all time low. Intense partisanism pleases only the intense partisan. It would seem logical to assume that it irritates the very persons who must be won in order to insure success, namely, independent voters. The man who had never voted a straight ticket in his life but who made up his mind to do so to spite his "screaming" morning paper is probably not an isolated case.

The radio as a vehicle of propaganda. The radio as an instrument for creating mass impressions will outdistance, if it has not already outdistanced, the press. In European countries it is operated by governments and in the countries ruled by dictators radio programs are hardly anything more than sustained governmental propaganda. Under private ownership in the United States, the radio is nevertheless subject to governmental control through a license system, and the possibility of government ownership is one of the reasons why American radio stations give their programs careful scrutiny. Communists, pacifists, and "radicals," seldom have an opportunity to use the facilities of the radio. Intentionally or unintentionally the radio champions the *status quo*. Broadcasting companies will turn down programs which would yield them large revenues if the material to be broadcast is offensive to large groups or is of such a nature as to disturb conventional attitudes. In political campaigns an effort seems to be made to give all parties, within the limits of their budgets, opportunities to present their programs and candidates. But even in campaigns the radio corporations exercise an anxious care. Thus, when Senator Arthur H. Vandenberg, in the campaign of 1936, started a radio "debate" with President Roosevelt by an ingenious arrangement in which he had reproduced the voice of the President from his previous speeches, the broadcasting system took him off the air.

The possibilities of the use of radio by the government is well illustrated by the success with which President Roosevelt has resorted to it since 1933. "The Nation will recall with kind memory that momentous night [in March, 1933] when the President sat in his study and first told a listening public over the radio what he proposed to do in aiding to solve the problems of a troubled nation," said General Hugh Johnson. "You will likewise recall," he continued, "the news of the speed of Congress in passing bills that carried out the President's program and how the stories of these events were disseminated through the radio and public press."⁴⁰ And who does not recall the monumental campaign the General put on over the radio and through the press for his own organization—the National Recovery Administration! And we know something of the extent and intensity to which the warring nations employ the radio.

⁴⁰ Quoted in Rosen, *op. cit.*, p. 160.

In summary, our few observations on pressure and propaganda come to this: (1) Pressure groups representing every variety of interest busy themselves in their attempts to control political parties, the public authorities, and the masses. (2) The platforms of political parties, the policies of governments, and the attitudes of the public are to a considerable extent determined by the programs of "education" and advertising promoted by the pressure groups. (3) Without underestimating the significance of motion pictures, billboards, sky writing, parades, and other vehicles of propaganda, students of pressure activities generally agree that newspapers and radio are perhaps its principal vehicles. (4) Political parties are most assiduous in the use of propaganda, and governments themselves rely upon it and will probably place greater reliance upon it in the future. (5) Some pressure is for "good" causes and some is for "bad" causes, with the common man strongly inclined to place in the former category the ideas and movements he endorses and in the latter those he opposes. (6) Pressures are perhaps eternal and inevitable. Groups have always fought for the control of government. The coming of democracy has simply brought the contest into the open, made the struggle more obvious, the problem of reaching the masses having been met by new propaganda techniques which operate on a very wide scale.

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Nominations

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We have learned that the most important functions of the political parties are those of choosing candidates for public office and conducting campaigns for their election. In this chapter, our chief concern will be with nominations, leaving the subject of elections for the next chapter.

I. THE NOMINATION OF CANDIDATES FOR THE PRESIDENCY ¹

The original plan and present practice. Far and away the most important officer to be nominated and elected is the President. The Constitution makes no provision for nominations for the presidency. It stipulates only that the President shall be chosen (elected) by electors to be named in each state as the legislature thereof might see fit. The Fathers of this Republic hoped and fully expected that the President would be chosen by a quiet body of well-bred electors, appointed by state legislatures, and far removed from the influence of the "madding crowd." But political parties and the growth of democracy have altered their plans beyond all recognition. Parties brought caucuses, conventions, and primaries for nominating purposes; and a democratic host fifty millions strong participates in the choice of a President and reduces the constitutional electors to a row of ciphers. Excepting a war, the choosing of a President is our most absorbing public activity. Although we take the campaign seriously, it is at the same time a great national sport. Enormous sums of money are raised to promote it; bets are made upon candidates as upon athletic teams or race horses; and politics is for months the talk of every circle from the most exclusive "silk-stocking" clubs down to the "Wide-Awakes" or the "Dirty Dozen." There is probably no greater political contrast than is found in the difference between the simple constitutional provision for the election of the President and the actual process as it has been

¹ R. C. Brooks, *Political Parties and Electoral Problems* (1933 ed.), Chs. X-XI; H. R. Bruce, *American Parties and Politics* (1936 ed.), Chs. XI-XIII; James A. Farley, *Behind the Ballots* (1938), Chs. I-II; P. Herring, *The Politics of Democracy* (1940), Ch. XVI; V. O. Key, Jr., *Politics, Parties and Pressure Groups* (1942), Ch. XIV; C. E. Merriam and H. F. Gosnell, *The American Party System* (1940 ed.), Ch. XIV; Louise Overacker, *Presidential Primaries* (1926); R. V. Peel and T. C. Donnelly, *The 1928 Campaign* (1931) and *The 1932 Campaign* (1935); E. M. Sait, *American Parties and Elections* (1942 ed.), Chs. XX-XXI.

developed by political parties and democracy. Despite the Fathers' distrust of the people and the somewhat juvenile and primitive features of contemporary campaigns, the process of nominating and electing the President of the United States is one of democracy's grandest spectacles.

A. The Rise and Fall of the Congressional Caucus

It was observed above that the Constitution is silent on the subject of nomination and that its framers thought the President would be chosen without any formal preliminaries. But political parties were functioning before the end of Washington's administration. Now, if a party is to win, there must be unity. There must be an agreement to support a particular individual for the presidency, or the party's electors will scatter their votes and give no one the majority.

The congressional caucus, originating about 1796, was the institution used by both the Federalists and the Jeffersonian Republicans² for the purpose of agreeing upon (nominating) party candidates. The caucus worked very simply. All the Federalists who held seats in Congress met and named their candidates, and the Republicans did the same. This method of nomination had certain advantages over our present convention system. (1) The caucus, composed of congressmen, was better fitted than ordinary voters or even state officers to pass upon the fitness of men for the highest office in the nation. (2) Since its members held office, the caucus could not escape responsibility for its choice of candidates, as the convention, which meets quadrennially for a few days, may so easily do. (3) The caucus did not name "dark horses," but tended to confine nominations to men of ripe experience and known opinions on public affairs. (4) Furthermore, it was likely to pick candidates acquainted with legislative temperament and methods, thus assuring some degree of harmony between Congress and the President. (5) Finally, the caucus was a very convenient means of making a nomination. It involved no expense, no choosing of delegates, and no long, tedious journeys to convention cities.³

The caucuses soon came to be denounced, however, as corrupt oligarchies, usurpers of powers which rightfully belonged to the people, and as tending to subordinate the executive power to Congress, charges in which there was some element of truth. Andrew Jackson and his followers dethroned (about 1824) the hated "King Caucus" as a nominating agency. For a few years thereafter candidates were endorsed by various state conventions, mass meetings, or even by caucuses of state legislatures. It was not long, however, until the national convention system was evolved. Several such conventions were held in the early 'thirties, and by 1840 the national convention had become an established institution. A generation

² The Federalists held no caucus after 1800.

³ Sait, *op. cit.*, p. 313.

ago it was challenged as the caucus before it was challenged, but the national convention successfully rode the storm.

B. The National Convention: Selecting the Delegates

The "call." Early in the winter preceding the summer and fall of the great party battle for the presidency, the national committees meet in Washington and issue the call for the conventions. Each call announces the time (usually about the middle of June for the Republicans and a few weeks later for the Democrats) and place fixed by the committee for holding the convention. The Democratic committee in its call gives a statement as to the number of delegates to which each state and territory is entitled; while the Republican committee goes further and lays down the process by which and the time within which the delegates shall be chosen, and indicates also the procedure to be followed in forwarding the credentials of delegates and the manner in which contesting delegates or delegations shall submit their claims.

Choosing the convention city. In deciding the important question as to where the convention shall meet, the national committee must consider the claims of local politicians, the inducements of business interests, and the broader questions of party advantage. Party leaders in a state want the convention in order that the party may be strengthened locally by the enthusiasm the great conclave engenders. They argue at the same time that success in the national election may depend upon a few voters who might be influenced by a convention in their state. Various business interests present the claims of their cities for the convention. They want the convention largely for the crowd and the business it brings with it. In 1940 Chicago gave the Democrats \$150,000, and Philadelphia gave the Republicans \$200,000 for their conventions. Location, railroad transportation facilities, hotel and convention hall accommodations, financial contributions, newspaper support and the extent of newspaper circulation, radio facilities, the local political effect of the convention, and the wishes of candidates and their backers, all determine the choice of the convention city. Chicago, St. Louis, and Baltimore are the favorite convention cities, although other important cities draw a convention occasionally. Sometimes strategy suggests the selection of a city well away from the center of things. Thus, the Democrats in 1928, fairly certain of the nomination of Wet and Catholic Governor Smith, picked Houston, Texas, in the Dry and Protestant South, in the vain hope of reconciling that section to a candidate unacceptable to many Southern Democrats.

Apportionment of delegates by the Democratic party. For seventy years or more, the practice in both parties, with certain exceptions to be noted, has been to give each state a number of convention delegates equal to twice its number of electors, and to give each delegate one vote. Thus,

a state with eight representatives and two senators in Congress, being entitled by the Constitution to ten presidential electors, is entitled by party rules to twenty convention delegates, each having one vote. In addition to the delegates from the states, each party allows a few delegates from the territories. On the basis of this method of apportionment the number of delegates in a national convention runs to about 1,100. In recent years, however, the Democratic conventions have had a considerably larger number of delegates (in 1940 the number was 1,844). This is explained by a liberal policy that party has pursued in permitting states to send extra delegates.⁴ Furthermore, by a rule adopted by the convention in 1940, each state that has gone Democratic in the preceding presidential election is to have two additional delegates at large. This was a concession to the Southern states for their agreement to the abolishment of the two-thirds rule (see below), a rule under which the delegates from those states had been able to veto the nomination of any candidate who might be unacceptable to them.

The Republicans' difficulty over apportionment. The rule that the party shall have twice as many representatives from each state as the state has presidential electors has done considerable violence to proportional representation in the conventions. Wide disproportions have always been especially glaring in the Republican party, for it has never had, except in 1928, a substantial following in the South. From many examples of gross unfairness, we take just one. In 1908 South Carolina had eighteen delegates to the Republican convention and cast only four thousand votes for Mr. Taft in November of that year, while Maine had twelve delegates and cast sixty-seven thousand votes. A little arithmetic will show that in making a nomination the Republican voter in South Carolina had twenty-five times the voice of his fellow Republican in Maine. But disproportionate representation was by no means the worst feature of the system. In nearly all the Southern states, the Republican organization was built up around those who held federal office. The sole interest of the organization was said to be in federal patronage. Consequently, skillful men in the national Republican organization could dispense offices in return for votes of the Southern delegates in the national conventions. The climax of this sort of manipulation was reached in 1912, when the Republican strategists, through their several hundred hand-picked delegates from the Solid South, nominated Taft and disrupted the Republican party in so doing.

MILD REFORMS IN APPORTIONMENT. The long-delayed reform in representation was made before the next (1916) Republican national conven-

⁴ Such delegates do not carry any additional convention votes for their states. That is prevented by limiting certain delegates to fractional votes. In recent conventions some delegates have had one-eighth or even smaller fractions of a vote, but the convention of 1940 voted that no delegate with less than one-half vote should be seated.

tion. Under the new plan, the number of delegates from the Southern states was considerably reduced. In 1921 a still more drastic (and equitable) plan of reduction was brought forward, but it was never put into operation because of opposition in the South and dire threats of revolt against the party on the part of a large number of Negro voters who held the balance of power in such border states as Missouri, Indiana, and Illinois. Three years later, ignoring the mandate of the preceding national convention, the national committee drew up a much milder plan designed to conciliate the threatening factions. The national convention of 1924, with victory in the air, was not disposed to quibble over the action of the national committee and adopted its recommendation, which was made contrary to the instructions of the preceding convention, without debate. In 1940 a slight modification was made in the plan of apportionment. It is now as follows: each state gets four delegates at large (two for each United States senator); two delegates at large for each congressman at large (a congressman chosen by the electorate of the entire state); a delegate from each congressional district that cast as many as 1,000 votes for a Republican candidate in the last national election and two delegates if as many as 10,000 Republican votes were cast; and each state that voted Republican in the last presidential election or subsequently elected a Republican to the United States Senate gets a bonus of three delegates.

How the delegates are chosen: BY CONVENTIONS. Delegates to the national conventions are chosen in two ways, by state or district conventions and by the voters in direct primaries. More than a majority of the states still use the convention method. A state convention may choose all of the delegates; it may choose the delegates at large and accept the recommendations of the delegates from each congressional district attending the state convention as to the delegates who should be chosen to represent such districts in the national convention; or the state convention may choose the delegates at large and conventions in each congressional district may choose the district delegates. It should be added that the manner of choosing delegates must conform to state law.

BY DIRECT PRIMARY. Since 1900 the system of direct primaries has been established in many states. Its purpose was to take state and local nominations out of the hands of professional politicians, machines, wirepullers, and the like. Advocates of the direct primary soon enlarged their activities and attempted to break the power of the irresponsible national conventions through the primary system. Wisconsin (1905) was the pioneer in this field, but Oregon (1910) enacted the first comprehensive presidential primary law. Other states followed quickly, so that before the conventions of 1916 there were twenty-four states with laws on the subject. Since then the movement has declined somewhat, leaving fewer than twenty states with some form of presidential primary law at the present time. The laws vary considerably in the several states, but the most com-

mon rule is that the party voters in a state elect the delegates to the national convention and on the same ballot mark their choice for the presidential nomination. The delegates elected from a state to attend the convention are expected (in some states required) to support for the nomination the candidate who received the highest number of votes in the state's primary. From 1916 to 1928 more than half the delegates who sat in national conventions were chosen by the direct primary, but, beginning with 1932, the number of such delegates has been considerably less than half. Even in the 'twenties, the period of the maximum use of the presidential primary, it was never a controlling factor in the nominating process. It is true that the primary results of 1928 did foreshadow the action of the party conventions, but there is hardly any doubt that Hoover and Smith would have been nominated had there been no primaries. In 1932 the Democratic primaries somewhat vaguely indicated that Roosevelt was the popular choice. But in 1920 the primaries showed no preference for Harding and Cox who received the nomination of their respective parties; and Davis, the Democratic standard-bearer in 1924, did not submit his name to the primary voters in a single state.

The presidential primary is without a doubt ineffective, and some of the principal reasons for its short-comings are as follows: (1) It is in operation in only a third of the states, and it is by no means uniform in those. (2) Not all of the candidates enter the primary race, and frequently those who do enter make a contest in only a few of the eighteen states, thus bringing about meaningless results. In 1936 Governor Landon's managers did not enter his name in the primaries of several large states, but sought to win for him the nomination by securing "unpledged" delegates or delegates pledged to an accommodating "favorite son," who at a seasonable time would "release" his delegates to Landon. Obviously such polls as those of the American Institute of Public Opinion give a much more accurate picture of the sentiment of the voters in respect to candidates for nomination than do primaries conducted in less than half of the states and eschewed by candidates in many of those. (3) No satisfactory method has been found for fixing the obligation of the convention delegate to support the voters' choice for presidential nominee. A further weakness of the presidential primary, and it is not the primary's "fault," is the conservative opposition to it in both political parties. A large number of very respectable men, leaders in politics and large private affairs, long for the earlier days when convention delegates were far removed from popular control.

It is not difficult to suggest great improvements in the presidential primary, and a number of excellent proposals have been made. From them the following plan is evolved: (1) The presidential primary should be national, conducted in every state for all political parties on the same day. (2) Any candidate who receives the majority of the votes of his party should

be declared the nominee. The national convention could then meet, "shake feathers, and brandish tomahawks," and draft the party platform. (3) In the event no candidate receives a majority in the national primary, then each aspirant for the nomination should be permitted to select a proportion of delegates corresponding to his proportion of the total party vote in each state, and the convention should proceed to nominate a candidate from one of the three highest in the national primary. This would spell the end of the "dark horse" and the "favorite son," although it would not entirely eliminate the "back stairs" and the "smoke-filled" conference room. This plan or one approximating it, would probably require a constitutional amendment. In any event, there is no indication that any such proposal is going to be adopted, for a large number of public men, including business men who take a very active part in national conventions, are hostile to any extension of the primary system. Furthermore, the American people show no interest in widening its use.

Pre-convention maneuvers for the nomination. Long before the delegates to the national convention have been chosen, long before the national committee has issued the call for a convention, candidates and their backers are busy. "A political campaign is a matter of years—not weeks or months," says James A. Farley, who ought to know. When did he and Franklin D. Roosevelt start their campaign to make the latter President? "Like everything else in politics," Mr. Farley explains, "the roots of this story are buried back in the annals of other years." Farley went to work in earnest on November 5, 1930, when the returns of the New York election showed that Roosevelt had been re-elected governor by the unprecedented majority of 725,001. In consultation with the Governor's closest associate, Louis McHenry Howe, he prepared a very careful statement. The statement was that Mr. Roosevelt could not escape becoming the next presidential nominee of his party, "*even if no one should raise a finger to bring it about*" [italics mine].⁵ Everyone knows that Farley raised many a finger, traveled many a mile, slapped many a back, learned many a first name, wrote many a "keep in touch," and chewed many a pack of gum to bring about Roosevelt's nomination.

In the months when Farley was bringing his candidate into the "sunlight of popular attention," the magazine *Time* entertained its readers with an account of how all politicians who had been stung by the presidential bee in November, 1930, should, and probably would, proceed to conduct their campaigns. This is a summary of *Time's* handbook on "How to Become President."⁶

(1) An inspiring candidate must acquire a "wise, devoted friend" who will work and speak for him as the candidate would for himself. "The aspirant cannot go about telling people he wants to be President." He

⁵ Farley, *op. cit.*, pp. 59-62. This book is well worth reading.

⁶ November 24, 1930, pp. 15-16; see also *Time*, May 18, 1936.

must leave that to his *alter ego*. The *alter ego* should be industrious, but not too obviously zealous; he should be distinguished, but less so than his candidate. (2) "Close in the background must be an eminent banker or financier." But the money must not be too obvious, nor should large contributions be made too early. (3) The aspirant should "find strong community of interest with the leaders of his party, . . . the permanent, entrenched leaders, rather than the party executives of the moment." (4) He should identify himself "early and firmly with a national issue"—"American Individualism," Unemployment, etc. "The tariff should be attempted only by acknowledged economic experts." (5) "Get a press! This is accomplished in several ways. The *alter ego* must see to it that editors get courteous, efficient service when they exhibit curiosity. Friends of editors may be asked to bring the editors to call, dine. . . . Writer friends should be encouraged to undertake character sketches. . . . Anecdotes (safe, amusing ones) should be frequently dropped among newspaper men. . . . Any cartoonable physical characteristics or appurtenances should be emphasized—as were [Theodore] Roosevelt's grin and spectacles, Taft's girth, Dawes's pipe, Smith's hat." (6) "The candidate must move about the country. Not aimlessly, of course, or just hoping he will be seen. He must be supplied with places to go, people to visit, ceremonies in which to participate. Dedications of bridges, schools, memorials—especially statues of great dead leaders of the party—are especially good." (7) He must "seem always full of health. . . . Bursting, booming, up-at-seven physical condition is readily suggested by appearing on horseback, walking to the office, going swimming, playing golf. Fishing from a boat is good," but the aspirant should "*never* be seen at the wheel of a yacht." (8) He should never "go around without a ladder." He should keep handy a means of climbing down from the eminence he has achieved; for failure to descend gracefully and in good spirits when the nomination prize goes to another is likely to do irreparable damage to one's chance in any future convention. The effectiveness of this kind of strategy, particularly in the use of the press, was well illustrated by Governor Landon's manager who in a few months' time lifted him from relative obscurity and presented him to the American people as the Republican candidate for the presidency.

G. The National Convention: Its Work and Its Methods

Personnel of the convention. Conspicuous among the delegates in a national convention are United States senators, members of the House of Representatives, and, until the passage of the Hatch Act (1939), a number of appointive federal officeholders. The Constitution states that persons who hold any of these positions shall be ineligible to serve as presidential electors. It is, therefore, contrary to the spirit of the Constitution for any

of them to be chosen as convention delegates, since the delegates have a much more important function to perform than the electors in the matter of choosing a President. Another objection to these officials' serving as delegates is found in the fact that it is largely through them that "steam roller" tactics are applied in a convention. In 1912 this crowd was largely responsible for the defeat of Theodore Roosevelt, the people's choice for the Republican nomination. Too long delayed was the Hatch Act, which prohibits federal administrative officers and employees to serve as convention delegates or to take any part in political campaigns.⁷

A convention commonly numbers among its distinguished delegates such elder statesmen as former ambassadors and ex-senators. Other influential delegates we find in the list of governors and state bosses. The rank and file of delegates are local officeholders or party leaders in those areas, business men or representatives of their interests, journalists, and so on. In recent years, women are frequently chosen as delegates, especially as alternate delegates. It may be said that the Democrats have done more, officially at least, than the Republicans to welcome the women as co-workers.

Convention preliminaries. The state delegations and other interested persons travel, in many cases, to the convention city on special trains, their expenses paid out of their own pockets, by affluent supporters of particular candidates, by rich candidates, or otherwise.⁸ They manifest something of the spirit which is displayed by students aboard a "special" leaving for the holidays or accompanying their team to a neighboring institution for the annual football classic. Outwardly there is usually enthusiasm, optimism, and accord; although actually one or more of these elements may be lacking. They arrive in the convention city with a great shout; and, wearing buttons or ribbons and carrying banners, they march to their hotel, perhaps to the tune of martial music. As the city and its hotels become filled with delegates, newspaper men, and spectators, there is a continuous stir and commotion. There is much going back and forth among delegations, especially among the leaders, in the interest of securing votes for various aspirants for the nomination. There is a rumor that A will be nominated on the first ballot, so why not get on the "band wagon"? Another rumor has it that B has told his supporters to vote for the nomination of C, and that a sufficient number of delegates are leaving A to assure C's nomination. Propositions are stated and promises made by one faction, to be met with evasion or counter-proposals by another. A few leaders may know about what the situation is; but the average delegate is more or less bewildered, and hot weather and crowded quarters do not

⁷ Excepted from the provision of the law are the President, the Vice President, department heads, and a few other officials of high rank.

⁸ A few states have paid a part of the expenses of delegates.

ease his state of mind. Practically everyone in the city seems to be working for some candidate. Even the bootblack is likely to importune his delegate client in the interest of a "favorite son."

The convention the center of interest. When the convention is formally opened, we find the delegates seated in groups by states and surrounded by thousands of excited spectators who sit in the galleries. The attention of the whole country is turned to the work of the President-makers. Millions attend the convention's deliberations *via* the radio, or reflect more leisurely upon its proceedings as they are recounted in the press.

The "keynote" speech. A temporary chairman, nominated by the national committee, and usually elected by acclamation, delivers a "keynote" speech. Its purpose is to bring about harmony and raise party enthusiasm to the highest pitch. The "keynoter" paints dark pictures of what the other party has done and may do to ruin the country, and from colored facts with admixtures of fiction produces a perfect painting of his own party, while his audience bursts forth again and again in tumultuous approval. He is likely to make an appropriate reference to each great name associated with the party's past, each reference being greeted with a roar of applause. In this connection it may be mentioned that Senator Fess, the Republican "keynoter" in 1928, somehow failed to mention Theodore Roosevelt, and rather academically claimed the floor the next day to insert a fitting eulogy.

The committees. Following this speech of the temporary chairman, committees are appointed on credentials, on permanent organizations, on rules and order of business, and on platform and resolutions. Each state and territorial delegation names a member for each of these four committees.⁹

THE CREDENTIALS COMMITTEE. Ordinarily, the credentials committee reports to the convention first. The national committee has previously made up a temporary roll of delegates, but its decision is subject to review by the credentials committee and by the convention itself. As a rule, there are few contested seats, and passing upon credentials is a relatively unimportant matter; but on occasion, when there are a number of contests, and when the votes are fairly evenly divided between factions, decisions on these contests may be decisive in determining the whole course of the convention. This was the case in the Republican convention of 1912, when Roosevelt was deprived of his majority because the credentials committee, following the preliminary decisions of the national committee, recommended the seating of some fifty Taft delegates, against the clear claims of Roosevelt "delegates." In 1932 the forces of Franklin D. Roosevelt won initial and significant victories when they seated favorable dele-

⁹ Under a rule adopted in 1940, the Democratic platform committee is doubled in size, half its members being women.

gates from the contested delegations of Louisiana and Minnesota. In some cases of contested seats, both claimants have been seated, each being given half a vote.

THE COMMITTEE ON PERMANENT ORGANIZATION. The convention is now ready for the report of the committee on permanent organization. This committee nominates the permanent chairman, usually agreed upon by party leaders long in advance, and the other permanent officers of the convention; and its recommendations are usually accepted by the whole body of delegates as a matter of course. An interesting contest over the committee's recommendation for permanent chairman occurred in the Democratic convention of 1932, but its nominee, Senator Walsh of Montana, was elected. The chairman is by far the most important officer named by the committee. He is called upon to preside over the largest, and at the same time the most turbulent, of all American public bodies. He must be a master of parliamentary procedure, prompt and firm in his decisions, and urbane and dignified in his bearing. Upon his installation, the permanent chairman makes a speech, often somewhat more restrained than the keynote speech.

THE COMMITTEE ON RULES. The committee on rules usually recommends that the convention follow as far as practicable the rules of the House of Representatives. In addition to the recommendations concerning convention procedure, this committee may also deal with such other matters as the composition and powers of future national committees and the mode of electing future delegates. Its reports, like those of the other committees mentioned above, are usually acceptable to the convention.

Drafting the platform. The committee on resolutions is officially charged with the responsibility of preparing the party platform. Long before the convention assembles, various leaders and bosses have been conferring informally on the subject of a platform. They have collected a great deal of data, and perhaps a tentative draft of a platform has been prepared. This material is referred to the platform committee. This committee then holds sessions, and there appear before it representatives of such organized groups as the A.F. of L., the C.I.O., the American Legion, the Association of Manufacturers, and the American Farm Bureau Federation—pleading, coaxing, and sometimes threatening the committee in the interest of getting this or that plank incorporated into the platform. Sometimes the committee has little else to do than report the platform which has already been prepared by the President or other party leaders. At other times, there is vigorous disagreement over the content of the platform; the committee may wrangle for several days over certain planks, and the fight may be carried to the convention floor.

CONTENT OF THE PLATFORM. Platforms have grown to such lengths that they now fill a dozen or more printed pages, although the Democratic

platform of 1932 constituted a desirable exception in the direction of brevity. A platform contains a glowing account of the party's recent achievements, praises a leader or two, and denounces the work of the opposing party. The greater part of the platform is devoted to a statement of party principles. In spite of the fact that a platform may make pronouncements on some fifty issues, it cannot be said that the policy of the party is made very clear to the voters. On some issues the platform sounds a clear note, to be sure; but on many others the language is ambiguous and evasive. Frequently, very important issues are untouched, because any mention of them is likely to alienate voters from the party. On the other hand, the platform may contain expressions of sympathy for the aspirations of Ireland for self-government or for unhappy people in various countries. Such solicitude for peoples in other lands is, of course, intended to win the votes of persons of those nationalities who have established themselves in the United States. It may be said that the chief purpose of the platform is to win voters to the party, rather than to state honestly and explicitly the principles the party would put into operation if entrusted with office. In consequence, few people take the trouble to read the lengthy document, and the party leaders are easily forgiven for conveniently forgetting platform pledges when the election campaign is over. Said a colored porter: "A platform ain't what you ride on; it's what you git in on." Of much more importance than the platform is the stand of the party's nominee on the issues; for, if he is elected, his policies, even those which are contrary to platform declarations, are more likely to prevail than the already half-forgotten promises the party made in national convention.

Nominating speeches. With the platform adopted, the convention is ready for the main purpose for which it assembled—the nomination of a candidate for the presidency. The roll is called by states, and some one in each delegation arises and makes a nominating speech; or, in case the state has no candidate to present, yields the honor of making a nominating speech to a delegate from a state which has a candidate; or makes a speech seconding a nomination already made. Convention oratory in general is impassioned and flamboyant, but the climax is reached in the nominating speeches. The orators declaim the glories of their country, "peopled with the greatest race of men who have lived since the sun first kissed the horizon of time."¹⁰ They work the delegates up to a frenzy over a candidate "who learned the simple lessons of Democratic faith in the furrowed field."¹¹ In recent years those who have placed men in nomination have shown a little more restraint, although "Babylon and Nineveh and ancient Rome wallowed in the wealth of material prosperity, stood naked and

¹⁰ Senator James A. Reed, naming Champ Clark in 1912.

¹¹ Martin W. Littleton, naming Judge Alton B. Parker in 1904.

unashamed in their perdition—and succumbed” in the speech nominating Hoover for a second term.¹²

Demonstrations. The conclusion of a nominating speech is the cue for pandemonium. Formerly these “demonstrations” were spontaneous; and the parades, songs, and shouts might last from ten minutes to half an hour. Now the managers are not willing to trust to spontaneity. The demonstrations are carefully arranged in advance and put in the ice box to be brought out at the proper time.¹³ The din, which in recent years has gone on from one to two hours, is made by the human voice, brass bands, and almost every conceivable mechanical instrument that will produce a noise. The idea seems to be that the delegates who are to make the nomination and the country at large will be influenced by the length and intensity of the demonstration which the mention of a candidate’s name invokes. As a matter of fact, the artificiality of all this synthetic uproar is obvious to all who have ever seen the genuine article as displayed by a high school or college student body in action at a football game. Competent observers are of the opinion that, however much the convention demonstrations may do to keep alive the redskin traditions on this continent, they have no influence whatever over the hard-boiled managers of a convention and hardly any more influence over the rank and file of the delegates. These sovereign representatives of the party join in demonstrations and counter-demonstrations, each faction trying to sweep the others off their feet; but if any change their votes, it is due to clever work and quiet words behind the scenes and not to the attempts to stampede or shell-shock them by noise.

The balloting. When all the nominating speeches have been made, the convention is ready to choose the standard bearer for the party. The roll is called by states, and the chairman of each state delegation announces the vote. In the Republican convention the delegates vote individually. For instance, ten delegates may vote for A, three for B, and one for C. When the vote of each delegation has been announced, the results are totaled, and if any person has a majority he becomes the candidate of the party for the presidency. If no one receives a majority on the first ballot, the balloting continues, and so do the informal conferences between leaders in the interest of various aspirants for the nomination, until some person wins a majority.

THE DEMOCRATIC UNIT RULE. In the Democratic convention, the vote of a state is ordinarily cast as a unit. For example, twenty members of a delegation may be for A, eight for B, and six for C; but the chairman of the state delegation, acting under the unit rule, will announce the vote as thirty-four for A. In other words, the person who receives the highest

¹² Speech of Joseph Scott.

¹³ See *Time*, June 27, 1932, p. 11, for an account of a staged demonstration; also *Time*, July 11, 1932, p. 9, for “Clocked Clamor.”

number of individual votes within a delegation is given the entire vote of the delegation. There are, however, certain exceptions to this rule. It is not applied if the state convention has not instructed the state delegation to observe it, and it is not applied in any case where the laws of a state require election of delegates by congressional districts and do not subject such delegates to the authority of the state convention or state committee of the party. This unit rule, emphasizing the importance of the state rather than the individual delegates, is in keeping with the ancient, if not always honored, Democratic principles of states' rights.

THE DEMOCRATIC TWO-THIRDS RULE RESCINDED (1936). Until 1936 the Democratic conventions held to the requirement that nominations should not be made except by two-thirds majorities. Adopted a century ago as a means of preventing certain individuals from winning nominations, it was criticized from time to time, particularly in 1932, when Roosevelt's manager, Mr. Farley, feared he could not line up a two-thirds majority for his candidate. Criticized for attempting to change the rules while the game was in progress, the astute manager dropped the matter. In 1936 there was only one candidate for the nomination and the convention took advantage of the opportunity to rescind the rule.

NUMBER OF BALLOTS REQUIRED. About half the time the convention nominates a candidate on the first ballot. This is quite likely to be true in the event the President is nominated for a second term, but it may also happen in the case of other candidates, as it did with Landon in 1936. At other times, candidates have been nominated without lengthy struggles, as was the case with Bryan, nominated (1896) on the fifth ballot; Hughes (1916) on the third; Franklin D. Roosevelt (1932) on the fourth; and Willkie (1940) on the sixth. Occasionally when the convention is deadlocked, that is, when delegates are so divided in their support of aspirants that no one receives the necessary majority, a number of ballottings may be necessary.

"GENERAL FAVORITES," "FAVORITE SONS," AND "DARK HORSES." A "general favorite" or "logical candidate" may not be able to secure the necessary votes because a number of other candidates with local reputations and known in political parlance as "favorite sons" are drawing too many votes. Or, and this is more probable, the vote may be divided among two "general favorites" and a few "favorite sons" in such a way as to prevent any choice. Under such circumstances, the balloting may go on and on, but fluctuating with each performance in response to the quiet work of the leaders who influence the delegates by argument, promises of government positions, and what not. All of this is sometimes without avail, and the leaders may then agree upon a "dark horse." He is usually, though not always, a colorless, tractable, relatively obscure individual of no great talent, who has hardly been considered for the nomination until

this moment; but the leaders pass the word along and he is duly nominated.

INSTANCES OF PROLONGED BALLOTING. The more recent instances of prolonged balloting have occurred in the Democratic conventions, with the nomination of Wilson (1912) on the forty-sixth ballot, Cox (1920) on the forty-fourth, and Davis (1924) on the one hundred and third after nine days of balloting. The difficulties the Democrats met in getting the necessary majority for nominations led, as noted above, to the rescinding of the two-thirds rule. There is some doubt as to whether its disuse will have the desired result; for a nomination before the fifth or fiftieth ballot is not so much dependent upon the majority required to make the nomination as upon convention harmony and party leadership. The longest series of balloting the Republicans have had in recent years occurred in 1920, when, after it became apparent that neither Johnson nor Lowden nor Wood, the three "general favorites," could get the nomination, the leaders turned to Harding, a "favorite son," and he was chosen on the tenth ballot.

D. The Principle of Availability

There are a number of motives which prompt the delegates to nominate particular men for the presidency. They range from such a purely selfish motive as the hope of getting an appointment to federal office, to the high desire to place the best qualified man in the White House. Whatever individual motives may be, there is little room to doubt that the dominant motive in practically every convention is to nominate a man who will bring victory to the party. And what sort of candidate is most likely to win? He must have a number of desirable qualities, which are classed under the general head of "availability." Availability is obviously a very elastic term. For instance, at one time the people may want an aggressive executive—a "trust buster" or a man with a "big stick"—at which time force and vigor in an individual is a quality of availability. After an administration or two dominated by this type of man, the people may tire of "executive autocracy and usurpation" and prefer a President who will be quiet, "let business alone," and "observe constitutional restraints." It should be noted also that availability includes all the reactions of the leaders and the people of various sections of the country, as well as the personal qualities of the candidate.

The qualities of availability. Following Professor Robert C. Brooks,¹⁴ we may summarize the qualities which constitute availability.

(1) Residence in a fairly populous pivotal or doubtful state. This is desirable, because a native of a state ordinarily has a better chance to carry it and win its much-needed electoral vote than does a citizen of some other state. This is one of the chief reasons why New York and Ohio

¹⁴ *Op. cit.*, pp. 318 ff.

have so often furnished presidential candidates. Neither Republicans nor Democrats are likely to name, for instance, Georgians or Pennsylvanians as candidates; for, without regard to the candidate's personal qualities or his residence, Georgia is certain to go Democratic, and Pennsylvania went Republican from 1860 to 1936.

(2) Because of the economic importance of the East and the Old West (for example, Ohio) and the large number of electoral votes the states in these regions possess, they have almost a monopoly on presidential nominees. Ohio is an especially favored state, because its candidates have the advantage of being considered slightly Western as well as residents of an important pivotal state. Frémont, Bryan, Hoover, and Landon are the only candidates who have resided west of the Mississippi.

(3) If a party has the President and he is serving his first term, he is almost invariably renominated. To withhold the nomination would be embarrassing to the party, for the reason that it would amount to a repudiation of its chief officeholder.

(4) A candidate once defeated is ordinarily considered not available, although the Democrats nominated Cleveland after he had been defeated in his second campaign and Bryan twice after his first defeat. Smith's failure to secure the nomination in 1932, after his defeat four years earlier, is the more common example.

(5) Candidates still in the vigor of manhood are preferred. The presidency is a burden even to the most robust man. Since 1860 the average age at which men have been inaugurated President is fifty-one.

(6) Ability as a campaigner is highly desirable, although not indispensable. Tact, affability, and kindred traits are also qualities of availability; but so, at times, are courageous bluntness and golden silence.

(7) Personal integrity is uncompromisingly demanded. The very breath of suspicion is sufficient to blast the hopes of a candidate, as is borne out by Blaine's defeat for the nomination in 1876 and for the presidency in 1884.

(8) The candidate must have a record in public service.¹⁵ Service in Congress or in the Cabinet may meet this demand, but nominees are less frequently chosen from these groups than one might reasonably expect. Availability may be lessened by fearless and successful service at these posts, because such service often makes bitter enemies as well as enthusiastic followers. Formerly, successful generals were frequently nominated; but the "Rough Rider" Roosevelt was the last military man to receive the nomination, and he was only incidentally a soldier. Governors, especially governors of large pivotal states, are often chosen. They not only have had experience in large affairs; but, because of their local

¹⁵ Wendell Willkie (1940) was an exception to this rule, although his nationally publicized contest with the President over the public utilities gave Willkie a build-up similar to that which a successful term of office might have brought.

character, they have seldom antagonized important men, with the exception of a few local rivals, bosses, and spoilsmen they may have thwarted.

(9) Lawyers, but not corporation lawyers,¹⁶ are more frequently nominated for the presidency than are members of any other profession.

(10) Finally, we might observe that a member of some Protestant sect has a distinct advantage over a Catholic or a "freethinker."

Are the best men nominated? Critics have said that nominations are made on the basis of availability rather than ability. But availability does not necessarily preclude character and ability. We must not forget that blameless character and a good record in public service are two very important elements of availability. As we look over the list of great men who have been passed over by conventions, we find Webster, Calhoun, Seward, Hay, Root, and a few others. On the other hand, the conventions nominated Jackson, Clay, Lincoln, Blaine, Cleveland, Theodore Roosevelt, and Wilson—a fairly good showing. When it comes to the men whom we have actually elected to the presidency, we have probably done as well in placing great men in that office as the British have in elevating great men to the premiership—each country has had its mediocrities and each its towering statesmen in its highest executive office. When the people of either country succeed in evolving a system whereby the best qualified man will always be assured of the highest place, they will be too good for this world.

Nominations for the vice presidency. We must return now to the convention, which ordinarily completes its work with the naming of a candidate for Vice President. This position is held in light esteem, and able men are reluctant to accept the nomination. This is unfortunate, for six times the Vice President has become President through the death of the Chief Executive. The nomination is usually made after party leaders hold a conference and pass the word around that Mr. X is the man who should be made the vice-presidential candidate. He may be chosen because his selection will assure the active support of a certain element in the party which is lukewarm toward the presidential candidate; or the choice may fall upon him because he resides in a pivotal state, or because he represents a different section of the country from that represented by the man at the head of the ticket. Usually he is named for a combination of reasons. Thus Charles Bryan, the brother of William Jennings Bryan, was nominated by the Democrats in 1924 to run with Davis in order to win the support of the influential "William J." for the Davis candidacy, to give the West representation on the ticket, and to make the conservatism of the urbane Davis more palatable to liberal Democrats. At the same time, the Republicans nominated Dawes of Illinois because he gave the West a place on the ticket headed by Coolidge of Massachusetts and

¹⁶ Again Willkie must be excepted. As an attorney he was connected with large business.

because the Republicans, having in mind Wilson's physical breakdown in the White House and President Harding's death in 1923, seemed to feel the necessity of naming a man for second place who was eminently fitted for the presidency. Perhaps, also, they felt that Dawes, with his mild but picturesque profanity and his underslung pipe, which became a symbol in the campaign, would make a splendid combination with Coolidge, the quiet doer of the day's work. Senator Curtis was nominated by the Republicans in 1928 because of his party regularity and his popularity with Western farmers. Speaker Garner received the Democratic nomination in 1932 for throwing his support in the convention to Franklin D. Roosevelt. Colonel Knox won the Republican nomination in 1936 because Senator Vandenberg did not want it and because the Colonel had graciously stepped out of the race for the nomination for President. In 1940 the Republicans nominated Charles McNary who with his large following of farmers was expected to be an excellent running mate for Willkie who represented industry and business. The Democrats nominated Henry Wallace because the President wanted him and was powerful enough to force the convention to accept him.

II. OTHER NOMINATIONS ¹⁷

The people of the United States must elect 435 members of the House of Representatives, 96 senators, about 10,000 state officers—governors, legislators, and others—and some 800,000 local officers.¹⁸ Making nominations for these offices is a matter of great moment.

A. The Convention System

The caucus. Until about a century ago, there were not many elective officers and the number of voters constituted only a small percentage of the population. In colonial times and in the early years of our independence a candidate announced himself, perhaps with the coy statement that he reluctantly consented to run because so many gentlemen had urged him to do so, or a group of politically minded persons at a rather informal meeting might name him as a candidate. This latter method was known as nomination by caucus. Concerning the caucus, John Adams made an oft-quoted entry in his diary, February, 1763: "This day learned that the Caucus club meets at certain times in the garret of Tom Dawes. . . . There they smoke tobacco till you cannot see from one end of the garret to the other. There they drink flip, I suppose, and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, col-

¹⁷ Brooks, *op. cit.*, Ch. X; Bruce, *op. cit.*, Chs. XI–XII; Key, *op. cit.*, Ch. XIII; Merriam and Gosnell, *op. cit.*, Ch. XIII; Odegard and Helms, *American Politics* (1938), Ch. XVI; Sait, *op. cit.*, Chs. XII–XIII, XVIII–XIX.

¹⁸ Merriam and Gosnell, *op. cit.*, pp. 273–274.

lectors, fire-wards, and representatives are regularly chosen before they are chosen in the town.”¹⁹ In state and local political affairs, the caucus became an established institution long before 1800. Local officers were nominated in some such manner as mentioned in Adams’s diary; state officers by the members of a given party in the state legislature—the legislative caucus; and, as we have seen, candidates for the presidency were named by the party groups in Congress after 1800.

ITS OVERTHROW. In the section on presidential nominations we learned that in 1824 the caucus was discredited as a method of choosing candidates for the presidency. Before this date the caucus had been greatly weakened in the states, and its life was probably not greatly prolonged by the introduction of the “mixed” or “mongrel” caucus—a caucus in which delegates from districts which had no party representatives in the state legislature would sit with their fellow partisans who held seats in that body and with them nominate candidates for office. Jacksonian Democrats opposed the caucus, whether pure or “mongrel,” as undemocratic, corrupt, and as subversive of the cherished principle of the separation of powers. The triumph of Jackson meant the overthrow of “King Caucus,” who had been sitting on a shaky throne for at least a decade.

The delegate convention. The caucus ceased to be used during the decade following 1820 except in the smallest political units—wards, towns, and townships. It was continued in these small districts for the purpose of nominating the party candidates for offices in these areas and for the additional purpose of naming delegates to city, county, and, in some cases, congressional district conventions. The delegates in any one of these conventions named the candidates for offices of the territory which the convention represented, and selected delegates to a state convention and sometimes to a congressional district convention. These higher conventions, repeating the process of the county or city conventions, named the party candidates for elective offices within the state or district and selected the delegates for the great national convention. It is thus apparent that the convention system was essentially democratic in theory, resting upon the small unit cells composed of the Toms, Dicks, and Harrys who might care to attend the local caucus. Democracy seemed to be satisfied—all candidates for elective office, from the smallest to the greatest, were nominated by the people or by their delegates, and, as the practice of adopting party platforms developed, the people’s delegates drafted them.

UNFAIR AND CORRUPT METHODS OF CHOOSING DELEGATES. But the convention hierarchy soon showed decided defects from the ground up. Frequently, the local caucus which selected the first set of delegates was composed only of very small-sized politicians and the “toughs” and “bums” of the community. It often met in saloons, or over livery stables, or in other places likely to discourage the attendance of the best citizens. It might

¹⁹ Quoted in Brooks, *op. cit.*, p. 254.

meet in a room too small to hold all the voters who might try to attend; but the "gang," having been previously notified, would be there early and occupy all available space. Or the local machine might hold a "snap caucus"; that is, meet in advance of the time set, perhaps display enough conscience to turn up the clock, and complete the work at hand before the arrival of the independent voters of the community. If the delegates to the conventions were chosen by the indirect²⁰ primary ballot, which became a rather common practice, the results were hardly any better. The party would keep its polls open for a few hours, and frequently ballots would be cast only by "straight organization men" and their followers. The ballot box might be stuffed; independent voters might be forcibly prevented from casting a ballot, or they might not be able to find the polling place; or fraudulent returns might be made—to mention only a few of the methods by which the professionals controlled the old indirect primaries. Of course, not all the local caucuses and indirect primaries were run by professional politicians, tricksters, and "plug-uglies," but altogether too many of them were, especially in the cities.

UNFAIRNESS AND CORRUPTION IN THE CONVENTIONS. If the very foundation of the convention system—the caucus and the primary—was grossly defective, it is not surprising that the convention itself failed to attain a high level. After the delegates were chosen, various politicians attempted to secure their support in the conventions by persuasion, entreaty, threats, promises of places on the public pay roll, and by actual bribery. Frequently two different factions of the party sent rival delegations to a convention, where, with scant regard for the merits of the claims of the contesting delegations, the professional group which controlled the convention would seat the claimants who seemed most useful to that group. Sometimes individuals who had no notion of attending a convention would have themselves selected as delegates for the sole purpose of selling their credentials to the highest bidder. Conventions were usually run by masters of the art of politics—men who were wise to all the weaknesses of their fellow men and who were often unscrupulous enough to turn that wisdom to their own advantage. There was money to be made in politics by men who possessed sharp wits and dull consciences. The ever-increasing number of public offices afforded positions for party men who paid a part of their salaries into the organization treasury. More important sources of revenue for the party organizations and for the enrichment of party leaders and bosses were found in the unholy alliance between business and politics. Graft in the letting of public contracts, especially in cities, in the granting of franchises for public utilities, and in affording "protection" to vice and crime ran into millions. Said Big John Kennedy, "It's a pretty good game at that, is politics, and it can be brought to pay

²⁰ The indirect primary must be carefully distinguished from the later direct primary, a system by which voters actually nominate candidates for office.

like a bank.”²¹ No wonder greedy professionals made every effort to control conventions. The loss of such control would mean a pass in dividends on the “good game.”

CONVENTIONS NOT ALL BAD. We must not assume that every state and local convention was a saturnalia of corruption. There were some honest conventions, and a larger number showed some evidence of responsibility to the general public. But the system taken as a whole was bad. It was bad for the reasons given above, and for the important additional reason that the rank and file of citizens were busy with their private affairs and they did not heed the exhortations of the clergy, the entreaties of the press, or the calls of the reformers to come out and do their duty.

B. The Direct Primary

In the generation which followed the Civil War various attempts were made by the states to limit abuses and corruption in the caucuses, primaries, and conventions; but gradually the idea spread that the solution of the problem lay in the direct primary, to be established by state constitutions and laws. The direct primary is a system by which the voters of a given party make their nominations directly in a party election, and it is to be distinguished from the old indirect primary in which the party voters elected delegates who then made the nominations at conventions. The direct primary is usually regulated in great detail by law, while the indirect primary rested for the most part upon party rules.

Origin and development of the direct primary. The direct primary seems to have originated in Crawford County, Pennsylvania, a few years after the Civil War.²² From there it spread to counties of the West and came into even more general use in the Southern states. After 1900 the movement for it was nation-wide; and it was championed by such men as La Follette, Bryan, the first Roosevelt, and Wilson. Today it has supplanted the convention system or seriously threatened it in nearly every state in the Union.²³ The states have widely different laws on the primary, however, and our space permits no more than a brief discussion of its general principles.

“Designation.” The process by which aspirants get their names on the official primary ballot is called “designation.” In a number of states, declaration of candidacy, usually accompanied by a small fee, is all that is required. The other common method of designation is by petition. The number of signatures required varies from state to state and in accordance with the importance of the office sought; but the number re-

²¹ Quoted in M. R. Werner, *Tammany Hall* (1928), p. xi.

²² There is proof of some use of it in the same county as early as 1842. Brooks, *op. cit.*, p. 261.

²³ Only in Connecticut and Rhode Island is the convention still undisturbed. New York and Indiana still employ the convention for state-wide, but not for local, offices.

quired is frequently excessive, running into hundreds or even thousands. If those who seek the nomination are backed by the party organization or machine, which is often the case, they are put to no inconvenience or expense in the circulation of the petition; but an independent candidate is at the disadvantage of having to circulate the petition himself, or having friends or paid workers do it for him. When a petition has received the requisite number of signatures, it is turned over to an officer authorized by law to receive it and pass upon its legality. If, upon examination, usually a very perfunctory one, the petition is found to meet the requirements of the law, the aspirant is entitled to a place upon the primary ballot. It has been proposed that party committees be authorized to name a slate of candidates, thus obviating the necessity of petitions and primaries except where elements in the party are dissatisfied with the slate named, in which case the dissenting groups may propose other candidates by petition and run them against the committee candidates in the primary.

Positions on the ballot. In what order shall the names be placed on the ballots? One might think that an alphabetical list would take care of the matter very simply, but it does not. It has been found that those who stand at the top of the list have a much better chance of being nominated than the others. Consequently, a number of states have adopted a system of rotating the names. Assuming, for example, that Abel, Hanson, and Young are seeking the Republican nomination for governor, by this system the ballots will be so printed that each aspirant's name will appear first on one third of the ballots, second on another third, and last on the other third. In a few states the order of candidates on the ballot is determined by lot. That the position on the ballot should have anything to do with the prospects for nomination is, of course, an indication of the limitations of the direct primary.

"Open" and "closed" primaries. Primaries are classified as "open" and "closed." Under the "open" system, which is used in only a small number of states, the voter is handed the ballots of all the parties. He retires to a booth, takes the ballot of his own party, and marks the name of the person he favors as the party candidate for governor, mayor, sheriff, and so on through the list. He then folds the ballot and deposits it. The ballots of the other parties he drops in a box for "blanks." The open primary has the commendable feature of preserving the secrecy of the ballot; but it is open to objection on the ground that it is possible for persons to vote in either party without any regard to their party affiliation, and they have often done so.

The "closed" primary is used in the great majority of the states. By this plan the voter must declare his party allegiance. In a number of states a simple declaration is not sufficient—he may be required to take an oath that he has been affiliated or will be affiliated with the party. When the election officials are satisfied as to the voter's party affiliation, they give

him the ballot of his party (but not the ballots of the other parties, as in the open system) and he retires to a booth and marks the names of persons he prefers as candidates for the various offices. One must not assume, however, that the closed primary is air-tight. On the contrary, we are informed that, even where the test of party affiliation is strict, it is usually possible for the determined or unscrupulous voter to step out of his own party and participate in the nominations of another.

The "blanket" primary. A new form of ballot, the "blanket" primary ballot, is worth our attention. As it is used in the State of Washington, all of the candidates for nomination appear on the same ballot, the candidates being grouped under the title of the office to which they aspire, each candidate having his party affiliation opposite his name. Every primary voter is given this blanket ballot. He may confine his selections to one party, or he may vote for a Republican aspirant for position of United States senator and for a Democratic aspirant for the post of governor and otherwise show his discrimination as a voter. The high man of each party for each office then appears on the ballot at the general election in November. Obviously, the blanket primary ballot makes for the greatest independence in voting in primary elections. For this reason it is very popular with the voters, and for the same reason it is very much disliked and feared by the old party "wheelhorses" and all good "organization" men.²⁴

Vote required for nomination. Nominations are commonly made by plurality (the greatest number) vote. If there are just two persons seeking nomination for an office, one will, of course, receive a majority. If there are three on the list, then we may find some such result as 35 per cent for A, 34 for B, and 31 for C. Under the plurality rule, applied in many states, the nomination would go to A, although it is clear that he is not the choice of a majority of the voters of his party. In order to prevent plurality nominations, several devices have been employed; but the only one used extensively is the double primary, employed by some six Southern states. By this system a first, or "free-for-all," primary is held. Aspirants who receive a majority of the votes are nominated in this first primary. But in respect to those offices for which no aspirants receive a majority, a second, or "run-off," primary is held to choose between the two who stood highest in the "free-for-all." This double system is troublesome and expensive; but, since the Democratic nomination is tantamount to election in these states, they naturally prefer conclusive primaries.

The nonpartisan primary. Many judicial and local officers are elected, in theory at least, on a nonpartisan basis. They are therefore nominated in the primaries on a nonpartisan ballot. On this ballot all the aspirants for nonpartisan offices are listed in groups, according to the office sought.

²⁴ C. O. Johnson, "Washington Blanket Primary," *Pacific Northwest Quarterly*, XXXIII, 27, (January, 1942).

All the voters, without any regard to political affiliation, are given the same ballot. For each nonpartisan office to be filled, the voter marks the name of his choice. When the ballots are counted, the two leading aspirants for any particular office are declared nominated for that office, and they will then appear as candidates on the nonpartisan ballot at the regular election which follows.

Comments upon the direct primary. Many of the earlier advocates of the direct primary saw in it a method by which the people would rise up in their might and nominate the most capable and honest men for office, while its opponents alleged that the candidates so nominated would be much inferior to those named by the conventions. After forty years, authorities still disagree concerning the relative merits of candidates chosen by conventions and direct primaries, and this disagreement would seem to warrant the conclusion that the types of candidates selected under one nominating system are about the same as those selected by the other.

In the second place, the direct primary is criticized because of the added expense it entails. The government must pay the cost of the primary election, and the candidates and their backers must pay the cost of the primary campaign. It is not infrequently asserted that the high cost of campaigns gives rich candidates an advantage over the poor candidates, but many poor men have been nominated in the primaries and it is common knowledge that large expenditures either by an aspirant or by others on his behalf have often failed in their purpose.

A third criticism of the direct primary is that it breaks down party responsibility. Such critics say that under the convention system the party leaders were responsible for the nominations made, and that under the direct primary system everybody, and hence nobody, is responsible. It is true that leaders and bosses were responsible in a sense under the convention system, but the voters found no satisfactory means of enforcing this responsibility. With our direct primaries, the leaders and bosses are still functioning; but they are subject to a much closer check by the voters than they were in the heyday of conventions.

A fourth charge against the direct primary is that, unlike the convention, it furnishes no means by which very desirable compromises may be reached between factions in the party. It is true, however, that the party leaders frequently hold consultations before the primary and propose candidates for the various offices, and that this "organization slate" is often ratified by the voters in the primary.²⁵ The only other criticism of the direct primary which we will mention is that it increases the task of the already overburdened voter. To the burden of electing scores of officers is added the duty of nominating candidates for those offices. The voter is practically helpless, for he cannot, even if he has the inclination, study the record and pass upon the fitness of each candidate. Consequently, in cast-

²⁵ Merriam and Gosnell, *op. cit.*, p. 279.

ing his vote he takes the advice of the party leaders, or perhaps he sees the impossibility of voting intelligently and remains away from the polls. This defect of the primaries can be largely remedied, as we shall learn, by the short ballot.

PROBABLY SUPERIOR TO THE CONVENTION SYSTEM. In spite of the number of weaknesses of the direct primary, the fact remains that it has corrected some of the worst abuses of the convention system. It is possible for the voters to defeat the "organization" if they really wish to do so. If bosses and machines still unfairly or corruptly control nominations, the voter must accept a share of the blame. Under the direct primary system it is perhaps easier for the independent candidate to win a nomination than it was by the convention method. It is but fair to state, however, that some independent candidates deny that this is true except in local primaries. Concluding, we may say that it is not likely that the direct primary will be generally abandoned; but it ought to be modified, particularly in the direction of relieving the voter of the onerous task of selecting candidates for so many unimportant offices.

Party platforms under the direct primary. How are party platforms made under the direct primary system? Clearly, the whole body of voters cannot make them. Consequently, the work must be done by conventions or by party councils. If the convention meets before the primary is held, there is no assurance that the platform drafted will conform to the views of the candidates nominated; but if the convention meets after the primary, the platform will very properly reflect the views of the nominees who have just been named by the voters. In a number of states the platform is framed by a party council after the primary has been held. This council is ordinarily composed of the candidates for important offices and a few others, such as members of the party who hold high public office or high party office. This method of framing a platform has decided merit, in that the framers are those who are directly responsible for carrying it into execution. With regard to state platforms, it should be noted that they are no longer considered of any great importance and that few people take the trouble to read them or even to acquaint themselves with their main provisions.

Socialist party nominations. Before concluding the chapter on nominations, a word should be said about the plan followed by the Socialist party. Its candidates for state and local offices are chosen by a referendum vote of the dues-paying members of the party. This referendum is held before the date fixed by law for the primaries. In states where the party, because of its small following or for other reasons, does not come within the primary laws, this referendum is sufficient to secure the candidates a place on the election ballot. But where the Socialist vote is large enough to give the party legal recognition as such, it must nominate by primaries in conformity with state law. In such states the party conducts its referen-

dum among dues-paying members as indicated above, places the names of the candidates so chosen on the primary ballot, and the Socialist voters proceed to give legal form to what has already been done in the referendum. Thus, both Socialist practice and the primary laws are satisfied. It would be possible, of course, for non-Socialists to "raid" the Socialist primary and nominate candidates who are not Socialists, but this has not happened. On all matters of policy party members have the right of initiative and referendum. The national convention consists of about two hundred delegates, one from each state and the others in proportion to dues paid by the Socialist organizations of the several states. The delegates are chosen by referendum vote. The party pays the expenses of its delegates, and its membership reserves the right to hold a referendum on all resolutions of the convention.²⁶

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Campaigns and Elections



In the preceding chapter we learned something of the nominating process. Our present task is to trace the course of campaigns and elections. The tactics employed in the battle for national, state, or local offices are essentially the same; and we must bear in mind that campaigns for the presidency, Congress, and many state and local offices are going on at the same time. But to avoid confusion, it seems best to deal separately with the presidential campaign.

I. THE PRESIDENTIAL CAMPAIGN ¹

The campaign manager. The chairman of the national committee is the campaign manager. He is always the personal choice of the candidate for President, although the national committee goes through the formality of electing him chairman after the presidential candidate has designated him. The position of campaign manager calls for the best talent the party can command. It requires a man of wide experience in large affairs, who is at the same time something of a diplomat. He must be a man in whom the business world has confidence; for the money and influence of this class are essential to the success of the party ticket. He must be an organizer on a big scale. He must know human nature. He should be conciliatory and tactful, yet he must be able to command. He must be cool under any circumstances; for the instant the general loses control of himself, his army is demoralized and goes down to defeat. Sometimes the candidate does a great deal of his own managing, as instanced by the two Roosevelts and Coolidge, but the more common practice is for the appointed manager to be the generalissimo.

Other party workers. The commander-in-chief will be assisted, of course, by the officers of the party, from those of general-staff rank down to the captains in the precincts. Thousands of public officeholders who

¹ R. C. Brooks, *Political Parties and Electoral Problems*, (1933 ed.), Ch. XII; H. R. Bruce, *American Parties and Politics* (1936 ed.), Ch. XIV; James A. Farley, *Behind the Ballots* (1938), Ch. III; P. Herring, *The Politics of Democracy* (1940), Chs. XVIII-XXI; V. O. Key, Jr., *Politics, Parties, and Pressure Groups* (1942), Ch. XVIII; Merriam and Gosnell, *The American Party System* (1940 ed.), Ch. XV; Odegard and Helms, *American Politics* (1938), Chs. XVII-XVIII; R. V. Peel and T. C. Donnelly, *The 1928 Campaign* (1931) and *The 1932 Campaign* (1935); E. M. Sait, *American Parties and Elections* (1942 ed.), Ch. XXII.

belong to his party will be at his service. In addition to these forces which can be counted upon at any time, tens of thousands of citizens who are only incidentally concerned with politics between elections will come out to assist in a presidential campaign.

The candidate's speech of acceptance. While the process of organizing for the campaign gets under way immediately after the nomination of the candidate, the fighting does not really begin until the candidate delivers his speech of acceptance. This speech the nominee makes when, a month or more after the convention has adjourned, he is formally notified of his nomination. Franklin Roosevelt's act of going to the convention city to give immediate acceptance constitutes a dramatic exception to the general rule and serves as an example of his strategy. In accepting the honor, the candidate takes occasion to give his views on the issues of the campaign. He usually gives his interpretation of the party platform, and he may even go so far as to modify certain parts of that platform.² As we stated in the preceding chapter, the views of the candidate are more important and attract much wider attention than platform declarations; for, if he is elected, his views are more likely to prevail than platform pledges.

"The strategy of superior place." The candidate must be given first place in the campaign. He must be kept before the people at all cost. We are told that the failure of the Republicans to observe this principle in 1916 led to the defeat of Mr. Hughes. Hughes talked about Wilson; Taft and Roosevelt talked about Wilson; and when Wilson spoke he talked about Roosevelt, Taft, and *Wilson*. Everybody was talking about Wilson, and nobody was talking about Hughes. Wilson had the advantage of "the strategy of superior place."³ In 1920, Cox, the Democratic candidate, was seriously handicapped because everybody was still talking about Wilson. John W. Davis could hardly get into the fight in 1924 because the Republicans ignored him. In 1928 Smith was practically ignored by Hoover. The original plan of Republican strategy for 1932 seemed to call for very little effort from Hoover; but it was later found desirable to bring him to the front to answer Roosevelt, who had early adopted the "strategy of superior place." In 1936 the Republicans attempted the strategy of attacking Roosevelt and his subordinates. The Democrats would not be drawn into any discussion of subordinates. They paid little attention to the charges against Roosevelt, but emphasized his positive achievements, his gallant leadership.

The "whirlwind" campaign. A number of candidates and their managers have made the mistake of thinking that the best way to appeal to the

² Just before he was nominated (1936) Governor Landon wired the Republican committee his interpretation of the party planks on child labor, the currency, and the civil service, and just after he had been nominated (1928) Governor Smith wired the Democratic National Convention that he disapproved of the plank favoring prohibition.

³ Sait, *op. cit.*, p. 607, from *Behind the Scenes in Politics*.

voters is for the nominee to tour the country relentlessly, make as many speeches as possible, and shake hands with as many as can get to him at hotels and railway stations. While there is no doubt that a speaking tour may be of decided advantage to a candidate, the authorities on such matters are in pretty general accord that it can be easily overdone. It is a great physical strain on the candidate to spend so much time on a train, to change climate frequently, to make hundreds of speeches, and to shake hands with tens of thousands. He has no time to prepare his speeches with care, nor are facilities available for giving them adequate publicity. When conducting a campaign of this sort, the nominee is in great danger of losing his dignity, and his speeches are almost certain to deteriorate in quality. He and his backers may be greatly impressed by the throngs which greet them at every stopping place, and they may think that victory is assured. They forget, however, as Melville Stone said, that nine out of ten who gather to see and hear the candidate would be equally excited by the visit of a circus. Stone attributed Hughes's defeat in 1916 to his "touch-and-go" talking. Arriving at a small town, he would make a hasty speech, which would be inadequately reported, and, on its receipt by the great metropolitan newspapers in the rush hour, it would be cut down, so that Mr. Hughes would hardly recognize his own speech when he read it in the papers the next morning.⁴ In 1940 Willkie made too many extemporaneous speeches on his tours, and at times he may have been indiscreet.

The "front-porch" campaign. In striking contrast to the "whirlwind" or "swing around the circle" type of campaign is the "front-porch" method of appeal. This method was employed most successfully by McKinley in 1896 while Bryan was "stumping" the country. Mark Hanna, McKinley's campaign manager, carefully arranged to have delegations representing various interests call on McKinley at Canton. The leader of a delegation would make a speech which the candidate had seen and approved some time in advance. McKinley was therefore able to make a carefully prepared reply. In this manner the Republican nominee outlined his position on the issues and reached the American public through the press in a way that Mr. Bryan could not possibly reach them with his itinerant plan of campaign. McKinley's method was followed to a considerable extent by Wilson in 1916, by Harding in 1920, and by Hoover in 1928. Smith made rather extensive tours in 1928, but he made speeches only at important points. Four years later Franklin D. Roosevelt followed the same general tactics; but President Hoover, despite his earlier declaration that he would do little campaigning, took a number of short trips, making speeches over a national hook-up at important points and rear-platform appeals at many of the smaller cities. He concluded his campaign with a

⁴ See Sait, *op. cit.*, p. 625.

dash to California. In 1936 and again in 1940,⁵ the candidates of both parties, despite their use of radio facilities, traveled widely and used many occasions for speeches. They seemed to consider the personal contact indispensable.

Other campaign speakers. It is highly desirable that a candidate be a good campaigner, but sometimes he is not. Whether the candidate be a superb campaigner or not, he cannot do all the speaking. He is assisted by thousands of others. Some of them can speak to the nation, and they are heard with almost as much interest as the candidate himself. Bryan was invaluable to Wilson. Taft and Theodore Roosevelt, especially the latter, almost eclipsed Hughes. Hughes and Borah delivered smashing blows for Hoover in 1928. A number of speakers will have no particular influence in the country as a whole and they may be unknown outside of their districts, but they have political power in those districts and their services in the campaign are indispensable. Other speakers are very carefully selected and sent out to make the candidate a place with the religious, racial, national, and economic groups.

Newspaper publicity. Intimation has already been made of the importance of newspaper publicity. Newspapers serve as one of the best means of making an appeal. Nearly all of them are connected with some party, and a number are owned by party leaders. The great journals are given information, often advance information, about practically everything that takes place in the theater of political operations. Smaller papers are given less; but the material is specially prepared for them, sometimes in the form of ready prints. This free newspaper publicity has been reinforced in recent years by paid advertising. The free propaganda of the party newspapers goes almost exclusively to the faithful, for they subscribe to those papers because they are in accord with their political views. The paid advertising may reach the unconverted, because space can be bought in journals of practically every party, group, or faction.

Other campaign literature. Tens of millions of documents are sent out by each party in the course of the campaign. Among them we may find millions of copies of the candidate's acceptance speech, extracts from his other speeches, and articles or speeches by various other party workers. The party has an asset in the speeches made in Congress for political purposes. These are reprinted by the government in unlimited quantities at cost, and sent through the mail free under the frank of a congressman. The most complete publication of the party is the *Campaign Textbook*. It contains a great deal of information about all parties: the biographies of candidates, acceptance speeches, platforms, party records on important issues, and other information. It is placed in the hands of journalists and

⁵ In 1940 Roosevelt tried to limit his travels and speeches, but in October he entered the campaign with zest.

party leaders. In the language of Professor Sait, it is for the teacher rather than the pupil.

Slogans and billboards. Slogans have frequently proved to be telling party propaganda. A good slogan is a declaration and a challenge, containing some elements of suggestion and appeal. It may strike the public fancy as a popular song. Running through the list at random we find "Tippecanoe and Tyler too," emphasizing the character of Whig candidates in 1840; "54, 40 or fight," the militant cry of the Democrats for all of the Oregon territory in 1844; and "Do we want a change?", the complacent query of the Republicans in McKinley's campaign for re-election in 1900. On fences, billboards, and in any other convenient space that could be had, regardless of the price, the Democratic manager in 1916 pasted a large poster of a happy home in peace time and with it the slogan, "He has kept us out of war." It made a most effective appeal at a time when all the great nations except the United States were at war. Not all slogans are sure winners. The great Republican victory of 1920 probably owed very little to the poster, "Let's Have Done with Wiggle and Wobble," which cost the party \$400,000. "Keep cool with Coolidge" and "Prosperity" sounded more convincing as Republican slogans in 1924 and 1928 respectively. "Happy Days Are Here Again" may have been effective, although it was only the expression of a hope.

Radio as a campaign medium. As already intimated, the radio plays a most important part in political campaigns. Aristotle said that a state should be so small that all of its citizens could be brought within the sound of a speaker's voice. With the radio, the United States meets what was long regarded as the Philosopher's rather impractical suggestion. Not only does the radio bring the addresses of candidates and their leading spokesmen into every man's home but, much more important, it discourages the old time oratorical method of appeal. Those most skilled in the use of the radio enter our homes unobtrusively and have a brief chat with us. We cannot be certain, but there is a very general belief that the radio is now the most effective medium of appeal to voters, more effective even than the newspapers. The appropriation for radio is commonly the largest item in the party budget. It is quite probable that the radio voice and the radio manner will be important considerations in choosing future nominees for the presidency.

Personal work. The campaign speeches delivered to thousands in auditoriums and at the same time to radio audiences of millions, the newspaper articles, their cartoons, and their advertising, the special campaign literature circulated directly by the party, the slogans and posters, valuable as they may be, will not win elections. A great deal of quiet personal work must be done. The best political brains of the party are applied to the task of winning the support of leaders of various groups. There is a chance

for drama in addressing a great audience, and some speakers are exhilarated when they are greeted with applause which resembles the "roar of mighty breakers on a rock-bound coast"; but a quiet conference with an individual who has influence may secure more votes for the party than a dozen of its orators can garner. In 1916 several Democratic leaders, somewhat to the surprise of the Republicans, it seems, were able to reach the influential German-Americans and secure through them a big German vote for Wilson. Personal work with the individual voter is conducted officially by the smaller fry of party workers, such as precinct captains and lieutenants. Humble voters, in numbers running into the millions, do a certain amount of personal solicitation. This unofficial work of the ordinary voter is important in the campaign; for there are few voters indeed who do not have some influence with others.

The campaign intensive in "doubtful" states. In "doubtful" states, the party goes to the greatest trouble and expense to learn how the people expect to vote. If a state seems "safe" after a canvass has been made, the leaders will keep sufficient forces there to hold it and send their reserves to other states which the canvass has shown to be doubtful. It is in the states which are fairly evenly divided between the great parties that the battles are most furiously joined, the money is most lavishly spent, and bribery and corruption are most likely to be employed. Although the campaign in these states is intensive, it is at the same time extremely cautious; for a pivotal state with its entire electoral vote may be won by a clever bit of strategy or lost by a small blunder.

Campaign blunders. The classical instance of a campaign blunder occurred in New York in 1884, when a group of ministers held an enthusiastic meeting to give Blaine, the Republican candidate, their endorsement and a certificate of character. Their militant chairman characterized Democracy as the party of "rum, Romanism, and rebellion," and the impertinent alliteration was received by his fellow clergymen with approval. Blaine was dozing or asleep when the speech was made, or he undoubtedly would have rebuked militant and aged Doctor Burchard for his impolitic utterance. As it was, neither Blaine nor any other Republican leader seemed to realize its significance until it appeared in the newspapers. Roman Catholics were incensed. Cleveland carried New York by the extremely small plurality of 1,149 votes, and the 36 electoral votes of that state made him President. The Burchard indiscretion has been characterized as "the most important feat of its kind since the cackling of the geese saved Rome."⁶ In 1916 organized labor in California was offended because Mr. Hughes attended a banquet served by "scab" waiters in San Francisco, and some other Californians turned against Hughes for

⁶ A. Johnston, "Political Showmen," *Forum*, July, 1932. Of course it is easy to show that prohibition or other issues defeated Blaine in New York; but certainly the Burchard incident, all other factors being what they were, was decisive.

his failure, through no fault of his own, to meet Governor Hiram Johnson when the two were in the same hotel. The California vote in November stood: Wilson, 466,289; Hughes, 462,516. The 13 electoral votes of that state gave Wilson his second term.

"The illusion of victory." All through the campaign, but more especially as it draws to a close, each party makes extravagant prophecies of its sure success, hoping to create the "illusion of victory"—a piece of strategy which may bring victory. The party is going to carry states which regularly belong to it by unprecedented majorities; it is certain to achieve success in at least three fourths of the states commonly considered doubtful; in the remaining states it will make a memorable showing! Straw votes are taken in districts or among groups known to be safe, for the purpose of carrying the illusion to the hesitant or skeptical. Bets, the prevailing odds being reported in the press, are thought by political leaders not to be without effect upon the voters. There is a strong belief among party leaders that there are thousands of electors who will jump on the winner's band-wagon, and the leaders therefore employ every device to present their candidate as the winner.

Political organizations have always made use of polls as a means of testing the strength of their candidates in particular areas and as indicators of the strategy which ought to be employed. Such polls are commonly the private property of the organizations. Beginning about 1916, the *Literary Digest* and other magazines and newspapers have been taking polls of the entire nation and giving the results to the public. Perhaps the best known and the most successful of these polls are those of Doctor Gallup and *Fortune*. By a scientific sampling of the electorate they have been able to estimate within two or three per cent the sentiment the electors later expressed in the official vote. Party leaders watch these polls closely. There can be no doubt that the party headquarters use them in determining their strategy, and, if a poll is favorable to a particular party, it uses it to create the illusion of victory. If, on the other hand, a poll shows a party in second place, the leaders will question its validity, perhaps denounce it, or even suggest that polls are a menace to free elections. There is no proof, however, that these polls have any effect upon the voters. It is encouraging that no such evidence has been found, that we may have exaggerated the band-wagon tendency.

What makes up the voter's mind. All of these activities of parties, and many more which we have not mentioned, are directed at the voter. How, in the midst of all the confusion of conflicting claims and evidence, does he make up his mind? The great majority of voters do not make up their minds for particular candidates and elections. They are Democrats or Republicans, and they support their party regardless of candidates and issues. We may go back one step further and say that the average voter was born a Democrat or a Republican; that he took his party affiliation

from his parents or playmates when he was in primary or grammar school; and that he rationalized his political faith when he grew up. From the results of numerous tests, Merriam and Gosnell estimate that 75 per cent of the voters belong to this "hereditary" group.⁷ To be sure, such issues as slavery, "sound money," and Prohibition have caused some of the hereditary voters to change parties temporarily or even permanently. A candidate's position on "moral" questions, his religion or lack of it, may alienate a few of the up-to-now party regulars. The economic depression during the Hoover administration seemed to cause many Republicans to desert their party in 1932. But the ordinary run of issues and candidates leaves three fourths of the voters practically unshaken in their allegiance.

THE INDEPENDENTS. But what of the 25 or 30 per cent of the voters who must make up their minds concerning issues and candidates at each election? The personalities and records of the candidates win or repel many independent voters. Thus, Wilson in 1916 received a large vote from independents and from independents with Republican leanings, while Hoover received the bulk of the independent and much of the independent-Democratic vote in 1928. Since that date, Roosevelt has had the support of independents, including a number who once were fairly good Republicans. The record of the party is also a potent factor with the independent voter. The "Let well enough alone" and "Do we want a change?" slogans may often be used with effect on conservative independents by the party in power. Independent voters may be appealed to on such points as a candidate's position on public utilities, his announced foreign policy, his attitude toward labor, and his conservation program. Again, the independent may be influenced by his friends, especially by those who happen to be in politics, by his clubs, by straw votes, by what he reads in the papers, and by the "illusion of victory." Many independent voters can give no more logical reason for their choice than the rabid partisans. The writer once asked a lady why she was supporting a particular candidate. "Oh," said she, laying her hand over her heart, "something just tells me that he is the man." A young student independent, with Phi Beta Kappa grades, said he could not vote for a particular candidate because he had dark rings under his eyes.

II. ELECTING THE PRESIDENT

The electors. The Constitution does not give the people the right to elect the President and Vice President. It states that they shall be chosen by electors; that each state shall be entitled to as many electors as it is entitled to representatives and senators in Congress; and that the electors shall be chosen as the legislature of each state shall see fit.

THEIR NUMBER. If a state is entitled to ten representatives, these, with

⁷ *Op. cit.*, p. 107. See also Key, *op. cit.*, pp. 616 ff.

its two senators, entitle it to twelve electors. The whole number of representatives is 435 and the number of senators is 96, making the total number of presidential electors 531. The Constitution stipulates that a candidate who receives a majority of the electoral vote (266 of the present number of electors) shall be President.

HOW CHOSEN. During the first few years of the Republic, the legislatures commonly chose the electors; but with the growth of democracy, they passed the privilege of choosing them to the people. After 1832 South Carolina was the only state in which electors were still chosen by the legislatures; and since Civil War days no state has employed that system, except Colorado, which reverted to it temporarily in 1876. The fact that the legislatures have given the voters the privilege of choosing presidential electors for a century places the election of the President and Vice President in their hands.

What happens is this: Each party in each state nominates a number of individuals for electors equal to the number of electors to which the state is entitled. These nominees are usually chosen by the party convention in the state, or by a party committee. Such nominees must not be members of Congress or holders of other positions under the national government, since the Constitution excludes these classes from electoral service. Usually, persons of dignity or useful partisans are picked for the honor. On the Tuesday following the first Monday in November (the date fixed by national law for the choice of electors) the voters go to the polls and cast their ballots for the electors, not for President and Vice President. More than a century ago the people of the whole state commonly chose two electors, and an elector was chosen by the people of each congressional district. This system had the political disadvantage of dividing a state's electoral vote, since districts might choose electors from different parties. In order to increase the power of the parties and the influence of the state in national politics, the general ticket system was adopted. By this method of choice, every voter in the state votes for all the electors to which the state is entitled. For example, if a state is entitled to twelve electors, a Democratic voter will vote for the twelve persons his party has nominated for electors. Although an individual may divide his vote among electoral candidates of two or more parties, it is obvious that he is extremely unlikely to do so.⁸

The election. The electoral candidates who receive the greatest number of popular votes in a state are elected. For example, if the Democratic electors receive 300,000 votes, the Republican 299,000, and the Socialist 100,000, the Democratic electoral candidates win, in spite of the fact that they have only a plurality, not a majority, of the popular votes. It usually

⁸ Many states have ceased going through the empty form of printing the electors' names on the ballot. In such states, a vote for the presidential candidate is counted as a vote for the electors of the party.

happens, however, that some party gets a clear majority of the popular votes in a state. Now, if Democratic electors are chosen in one state, we know that those electors, being good party men, will cast their votes for the Democratic candidates for President and Vice President when the time comes for them to do so. If Republican electors are chosen in another state, we know that they will be loyal to the Republican candidates. Consequently, when we know what electors have been chosen in each of the forty-eight states (as we do Tuesday night or Wednesday morning), we know exactly how many electoral votes each candidate for President will have. If one of them will have as many as 266 electoral votes (a majority), he is our next President. On the first Monday, after the second Wednesday in December, the electors meet at the various state capitals and go through the formality of voting for President and Vice President. On January 6, the votes are formally counted at a joint session of the two Houses of Congress, and the president of the Senate announces the "state of the vote."

THE HAYES-TILDEN ELECTION DISPUTE. In 1876 a grave crisis arose in connection with the electoral vote. Tilden, the Democratic candidate, had 184 votes; Hayes, the Republican candidate, had 164; four states having an aggregate of twenty-one votes sent in conflicting returns. The Constitution was silent on what should be done in such a case. Congress had taken a less weighty dispute which arose out of the election of 1820 into its own hands; but, with the House of Representatives Democratic and the Senate Republican, Tilden needing one electoral vote for a majority, and Hayes twenty-one, a deadlock resulted between the two Houses in 1876. Consequently, they created an electoral commission of five judges of the Supreme Court, five senators, and five representatives. As eight of them were Republicans and voted together on all important points raised, Hayes received the twenty-one votes in dispute and became President. In 1887 Congress passed a comprehensive law which places the responsibility of settling such disputes upon the states, although in certain extreme cases Congress may take a state's electoral vote dispute into its own hands.

WHAT HAPPENS IF THE ELECTORAL COLLEGE DOES NOT ELECT. If no candidate for President receives a majority vote in the electoral college, the Constitution requires that the House of Representatives shall choose the President from the three who stand highest on the electoral list. The Constitution provides further that in such cases each state delegation in the House shall have one vote; that members from two thirds of the states shall constitute a quorum; and that a candidate who receives the vote of a majority of all the states shall be President. If, when the election devolves upon the House of Representatives, that body should fail to choose a President before the 20th day of January (formerly before the 4th of March), the Vice President shall act as President. Two Presidents have

been chosen by the House. The electoral college tied 73-73 on Jefferson and Burr in 1801, and the House then elected Jefferson. In 1824 the electoral vote stood: Jackson, 99; Adams, 84; Crawford, 41; and Clay, 37. The House, having the authority to choose any one of the three highest on the list, elected Adams.

If no candidate for Vice President receives a majority of the electoral votes, the Senate, each senator having one vote, chooses the Vice President from the two candidates who stand highest on the electoral list. Two thirds of the Senate constitutes a quorum for this purpose, and a candidate who receives the votes of a majority of all the senators is elected. When a President is to be chosen in the House of Representatives and a Vice President in the Senate, it is possible for a deadlock to occur in both bodies, leaving the country without a President or Vice President at the date of inauguration. This is extremely unlikely, of course. In any event, the Twentieth Amendment (1933) gives Congress the authority to provide for such contingencies.

MINORITY PRESIDENTS. Although the people choose the presidential electors, it does not necessarily follow that the candidate who goes to the White House is favored by a majority of the voters. It was shown above that a candidate receives all the electoral votes of a state if the electors of his party receive a majority or a plurality of the popular votes. Now suppose that one candidate's electors receive larger majorities or pluralities in states which have less than half the total electoral vote than another candidate's electors receive in states which have more than half the total electoral vote; it is clear that the latter candidate may win the presidency on fewer popular votes than his opponent received. This happened in 1876, when Tilden received 250,000 more popular votes than Hayes, and Hayes became President by an electoral vote of 185 to 184. It happened again in 1888, when Harrison was elected by an electoral vote of 233 to 168, although Cleveland had received 95,000 more popular votes. If there are three or more strong candidates in the field, we are almost certain to get a "minority" President. In 1860 the popular vote stood: Lincoln, 1,866,352; Douglas, 1,375,157; Breckinridge, 845,763; and Bell, 589,581. But Lincoln, having the plurality in many states, received 180 of the 303 electoral votes. In 1912 Wilson, with about 42 per cent of the popular votes, had 435 electoral votes; while Theodore Roosevelt, with 27 per cent of the popular votes, won 88 electoral votes; and Taft's score was 23 per cent of the popular votes and only 8 electoral votes.

Proposed changes in the election system. Some observers are dissatisfied with our electoral system, and they propose various remedies. It is suggested that we abolish the electoral college, which for at least a century has been only an empty shell. Its abolition need not change the part of the state in electing the President. The state vote for President could still be determined, as now, by the number of its representatives and sena-

tors in Congress, and cast for the candidate who received the highest number of popular votes in the state.⁹ A more far-reaching proposal is that we adopt the system of direct election by the people. This plan in its simplest form would mean that the candidate who received the highest number of the nation's votes, without regard to state or district divisions of the country, would be President. Few advocate the popular election of the Chief Executive in this form; for it would tend to break up the states as political units and it would give the congested areas of the country a larger voice in the election than they now have. A plan which provides that a majority or plurality of voters in a majority of the states shall elect, meets with favor in some quarters; but it is obvious that it would enable small and sparsely settled states, which contain much less than half the population, to carry an election. Each of these proposals calls for the abolition of the archaic electoral college, but beyond that not one of them has a clear advantage over our present system. It cannot be said that there is any general demand for a change, and any one of the plans suggested would call for a constitutional amendment, which means a hard fight even where there is an insistent demand for an amendment.¹⁰

III. CONGRESSIONAL CAMPAIGNS

One third of our senators and all of our representatives are elected biennially, on the Tuesday following the first Monday in November of the even years. Quadrennially, therefore, they must be elected at the same time the people choose the President—the presidential electors, to be more exact.

Organizations supporting candidates. Candidates for Congress are for the most part strong party men, and in consequence they receive the support of the state and national party organizations. Each party has a senatorial and a congressional committee, which help plan the campaigns and furnish speakers and "literature." These committees work in co-operation with state committees, and in very close co-operation with the national committee; for from the latter their main financial support is derived.

Influence of presidential campaigns. In "presidential years" the White House is the chief objective, and all other party activity must be in co-operation with and, to some extent, subordinate to the campaign to elect the President. In these years the fortunes of the candidates for Congress are largely tied up with the fortunes of the presidential candidates, although candidates for the House of Representatives in districts in which their

⁹ A constitutional amendment carrying this provision almost passed the Senate in 1934.

¹⁰ For criticism and recommendation on the electoral process see J. C. Allen, "Our Bungling Electoral System," *Am. Pol. Sci. Rev.*, XI (1917), pp. 685-710; J. E. Kallenbach, "Recent Proposals to Reform the Electoral College System," *Am. Pol. Sci. Rev.*, XXX (1936), pp. 924-929.

party is very strong and candidates for the Senate in states in which their party is supreme will be elected in any case. The voter will ordinarily vote a "straight ticket," which means that a "landslide" for a party's candidate for President will bring a number of men to Congress who would not be sent there otherwise. There are exceptions to this rule, of course, as instanced by the fact that several Democrats were elected to the Senate in 1928, although their states gave majorities to the Hoover electors.¹¹

The congressional campaign in "off years." We can get a better picture of the congressional campaign in the off years—the election years which fall between the quadrennial struggles for the chief magistracy. The chief issue of the campaign is frequently the President's record. This was particularly true in 1934 and 1938. In 1942 the issue was in part on the President's conduct of the war, but perhaps more on the political conduct of Congress during that war. The charge that Congress had shirked and dodged its duty in the matter of a revenue bill, on the problem of price control, and other questions seemed to stick. It is true that the voters were not particularly discriminating, but they did make rather extensive changes in the personnel of Congress. The party opposing the Administration vigorously points out its shortcomings and asserts that what is needed in Congress is more "backbone," more men who will "stand up to" the Administration, who will assert the rights of Congress and throw the "rubber stamp" to the salvage collectors. Often there is no clear-cut national issue, and even if there is, contests may be won in states and districts on purely local issues, personalities, or promises of "pork." Few candidates are so frank, however, as W. J. Bulow, South Dakota's Democratic candidate for the Senate in 1930, who is reported to have said, "There ain't any great issues out here, I guess. Mac's [Republican Senator W. H. McMaster] got a job and I want it."¹²

Aid from general headquarters. While the individual candidates must bear a large part of the responsibility for their election in off years, this does not mean that the national party organizations leave them to their fate. The various political leaders, committees, and experts will do their best to help party regulars all along the line. Some idea of the sort of thing that is done is furnished by *Time's* breezy discussion of the 1930 campaign strategy.¹³

"Party leaders in Washington supply the campaign words-and-music, which candidates repeat on the stump throughout the land. Chief Republican composer: James L. West, director of publicity. Chief Democratic composer: Charles Michelson, director of publicity. They write the statements that are issued under the names of party leaders. So sharp have been Composer Michelson's attacks on President Hoover that last

¹¹ This happened in New York, Texas, and other states.

¹² *Time*, October 27, 1930, p. 16.

¹³ September 8, 1930, p. 14.

week Chairman William Robert Wood of the Republican Congressional Campaign [Committee] cried out in hurt protest, charged the Democrats and Mr. Michelson with a 'plot' to slander the President and undermine his influence. . . .

"Pressagent Michelson dug through old issues of the *Congressional Record*, found where shortly after the World War Mr. Wood himself had assailed Herbert Hoover, had called him an expatriate and 'the most expensive luxury ever fastened on this country,' had warned that he was 'unfit for a responsible position of trust.'

"When Pressagent West brought out a fat statement listing all the party's 1928 pledges and how the G.O.P. had carried them out (except for an antilynching law), Pressagent Michelson, under the name of Congressman Cordell Hull, guyed him for omitting the party platform's preamble assuring the country of continued Prosperity, raised anew the deadly cry of 'Hoover Panic,' on which the Democrats this year have founded their campaign."

The President himself may take a part in the off-year campaign. He must not be too aggressive in his activity, for the voters seem to resent a President's appeal for a Congress to his liking; but he may assist individual candidates in various ways—by letters, by opportune visits to their districts, by patronage, and by other means. In recent years the instances of executive participation in congressional campaigns has occurred in the primaries, those of 1938 (see Chapter 7, section I). The failure of President Roosevelt to make effective his efforts to defeat certain anti-New Deal candidates in those elections may serve to warn Presidents to restrain their activities in primary elections as the failure of Wilson in the general election of 1918 warned them to be cautious of intruding in the general election campaigns. Indeed, interference in the primaries is much the more risky undertaking, for it results in intra-party strife, which may be fatal!

IV. STATE AND LOCAL CAMPAIGNS

The national party battles by no means end the story of campaigns and elections. In the states, the fight is on for governors' chairs, memberships on numerous boards and commissions, seats in the legislatures, and places on the bench; in the counties, sheriffs, commissioners, surveyors, assessors, school superintendents, and coroners are among those to be elected; and in the cities, mayors, councilmen, and a number of other officers are to be chosen by the people. Not all of these officers are elected on the Tuesday after the first Monday in November in the even years, the date of the national elections; but many of them are elected at that time, and these must necessarily compete with candidates for national office in the unequal contest, a very unequal contest in presidential years, for the voters' interest. We must remember, too, that candidates for the

great majority of these offices are nominated in direct primaries, which means that there must be two campaigns and two elections for all the offices to which the direct primary applies.

Controlling factors in state and local campaigns. National issues are often controlling factors in state campaigns, and not infrequently in local campaigns. This comes about because national issues are usually the center of interest and because many state and local elections, with the exception of city elections, occur on the national election days. The typical voter, obeying his own partisan impulses, or too much a victim of inertia to vote for candidates in different party columns, or hearkening unto the voice of party leaders to vote the ticket "straight," marks his cross in the big circle at the top of the party list, thus supporting his party for all offices from President to constable. But at times the states and local communities have great concerns of their own; they will not subordinate their problems to the national issues. Personal or factional feuds, struggles of the public against the interests of railroads, power magnates, local public utilities, insurance companies, mining and manufacturing interests, and various other groups, may temporarily or for a considerable period of time bring parties, factions, and voters to consider issues or problems in their states or counties or cities independently from those of the nation.¹⁴ It happens, therefore, that states sometimes, and cities frequently, elect the candidates of one party to national office and the candidates of another to their own offices. This division of the honors of office comes about not only for the reasons just given, but also because the ties of party do not bind the voter in state and local campaigns, particularly in the latter, as they do in national campaigns. Even in national elections a lapse of party regularity is now condoned or easily forgiven, a tolerance quite unknown thirty or forty years ago, when "scratching the ticket" in such elections was little short of treason.

Campaign methods. The methods of reaching the voter in state and local campaigns are, in general, about the same as those employed in the national contests. There are important shades of difference, however. Merriam and Gosnell tell us that personal squabbles, factional strife, class consciousness, sectional jealousies, race prejudice, and religious antipathies are found in more intense form in individual states than in the country as a whole, thus giving state campaigns more complications than the national campaigns. The local communities may be said to hold the same difficulties for the campaigner as the state. Two general courses are open to the candidates: they may walk the tight rope, sidestep, wiggle, wobble, and "weasel" in the attempt to win votes from all groups or factions; or, they may pick out the classes which have the greatest number of votes, pose as the champions of their interests, and make capital of their declared hostility to, let us say, Wall Street, "bloated bondholders," and "soulless cor-

¹⁴ Merriam and Gosnell, *op. cit.*, pp. 357-359.

porations." The latter method is, more likely to prove effective if the candidate is a practical psychologist. Candidates are, of course, backed by various party organizations, which help them with speakers, "literature," and money. In the local areas the candidates can do a great deal for themselves through personal contact with a large number of voters, sometimes all the voters in their district.

Pettiness and personalities in campaigns. Sometimes state and local political contests are conducted on the somewhat dignified plane that usually characterizes the national campaigns. At other times militant gubernatorial or mayoralty candidates with burning issues and eager backers conduct "hammer-and-tongs" campaigns. Not infrequently our campaigns, other than national, degenerate to trivialities and personalities. Here is a rather extreme example of the latter type. The fact that it comes from a Texas "run-off" primary does not impair its value as an illustration; for, there, success in the Democratic primary is equivalent to election. Mrs. Miriam A. ("Ma") Ferguson, the state's chief executive during 1925-27, and wealthy Ross A. Sterling were candidates for governor in 1930. Retiring Governor Dan Moody fired the heaviest projectiles against "Fergusonism" for Sterling, while Mrs. Ferguson's husband, removed from the executive mansion of the state by impeachment in 1917, championing the cause of the "common people," mixed the poison for the "millionaires." "Husband Ferguson drew enormous crowds, set them wild with denunciations of Messrs. Moody and Sterling. Newspapers were given libel law waivers by Candidate Sterling to print anything Stumpster Ferguson said against him, but Mrs. Ferguson would not grant the press the reciprocal privilege. Her husband, appealing to the 'common folks at the fork of the creek,' mocked and jibed at Candidate Sterling's handsome Bay Shore house, declared it had no less than 27 bathrooms." Sterling, who was no public speaker and left the stumping to others, did feel called upon to explain just why he needed *eight* bathrooms in his home, and he expressed the hope that every citizen of Texas might have at least one bathroom.¹⁵ Sterling won this particular campaign, but two years later he lost to Mrs. Ferguson in a similar "run-off" contest.

V. THE VOTING PROCESS ¹⁶

In our chapter on "Citizenship and the Suffrage," we learned that citizens who are at least twenty-one years of age, who have resided in a community a sufficient period of time, who have passed the literacy test and paid a poll tax in states where they are required, and who are not criminals or insane, may register as voters. In this section, we are concerned

¹⁵ *Time*, September 1, 1930, pp. 19-20.

¹⁶ Brooks, *op. cit.*, Ch. XV; Bruce, *op. cit.*, Ch. XVII; Key, *op. cit.*, Ch. XXI; Merriam and Gosnell, *op. cit.*, Chs. XVII-XVIII; Sait, *op. cit.*, Ch. XXVII.

with the regulations and conditions under which votes are cast on election day.

The polling place. The county or city is divided into precincts or districts, each of which contains several hundred voters. Each precinct has its polling place. Formerly, the prevailing practice was to rent private property for this purpose, but this gave too much opportunity for graft and favoritism; so that the tendency now is decidedly in the direction of requiring the use of school buildings, police stations, or other public structures. Sometimes churches are used. A few states blessed with good climates make considerable use of tents.

Election officers. When the voter enters the polling place, he finds that several individuals, almost invariably one or two from each of the great parties, are serving as inspectors or judges of elections. These persons are responsible for the proper conduct of the election in the precinct. If they are corrupt, elections become frauds in spite of volumes of laws intended to keep them pure; for, as a learned judge once said, no statute has yet been drafted which will serve as a substitute for an honest man. The theory that dishonest inspectors of the two major parties will check each other and thus keep an election pure has some fatal defects in practice, and the soundness of the theory may well be questioned. Two dishonest men who happen to belong to different political parties are no more likely to give us an honest election than two wrongs are to make a right. These men may put personal gain above party advantage and sell out; or it may be both to their personal gain and party advantage to trade in election frauds. There are a number of cases in which party machines have reached agreements to "count out" third-party candidates. Some years ago in Chicago an election official, in imminent danger of being detected at this particular crime against the voters, actually ate twenty-eight ballots which had been cast for the "wrong" candidates. Sometimes the machines agree to trade votes; for example, presidential votes for gubernatorial votes. In such cases it may become the "duty" of the inspectors to make the exchange. It is encouraging to note that authorities are practically unanimous in the conclusion that such frauds are much less common now than they were a generation ago.

Watchers. In addition to the election officers, the voter will find watchers at the polls. These individuals represent the different parties and candidates, and they have the right to see everything that is done by the election officials, in regard to both casting and counting the ballots. If they are honest, alert, familiar with the election laws, and know many of the voters, they can do a great deal to preserve the integrity of an election in their precinct.

Earlier methods of voting. A century and a quarter ago, a number of states used the oral (*viva voce*) system of voting. The voter simply approached the county polling place, where the candidates for county and

sometimes higher offices and frequently a considerable crowd had collected. Upon being recognized by the judges and being told by them to vote, he pronounced the names of his candidates, whose words of thanks were often drowned out by the applause and jeers of opposing partisans. This oral pronouncement was considered by many important people to be the only manly way to vote, and it was still preserved in a few states until after the middle of the nineteenth century. The paper ballot, which was very generally substituted for oral voting a century or more ago, was no great improvement over the latter. The ballots were printed by the party, contained only the names of the candidates of the party, were distributed by the party's "ticket peddlers," and were cast in the open. The fact that a ballot contained only the names of the candidates of one party made it impossible for a voter to divide honors between parties, unless he "scratched" some names on his ticket and wrote in the names of other candidates. If he had the energy or independence or courage to do this, he was almost sure to be detected and rebuked or even slugged by party workers. The old type of ballot made machine control of elections very easy, because watchers could see how everybody voted and could therefore see that "the goods paid for were actually delivered."

The Australian ballot. In 1888 a ballot long used in Australia and therefore known as the "Australian ballot," was introduced in the United States, and it is now used in some form by all the states except South Carolina. This ballot is printed and distributed at public expense; it bears the names of all candidates; it is given to each voter only at the polling place; it is marked by the voter in secret. The original Australian ballot did not designate the parties of the candidates. It simply listed each group of candidates under the office they sought. Because of the multiplicity of offices, and in the interest of parties, we have modified the Australian plan. In Massachusetts and in some dozen other states, the candidates for governor, Congress, and other offices are listed in separate groups; but the party of each candidate is printed after his name. According to the Massachusetts plan, the voter must mark the name of the candidate of his choice for each office. In the greater number of states, the Australian ballot has been still further modified. Each party is given its own column on the ballot; and the voter, by simply putting his mark in the big circle at the top of his party column, votes for the candidates of his party for all the offices to be filled. If the voter wishes to "split" his ticket, that is, vote for candidates of another party for some of the offices, then he puts his cross in the circle of his favorite party and makes a cross opposite the name of each candidate he prefers who is in the column of another party. It is clear that the party column type of ballot makes it easier for one to vote the "straight" party ticket; that it tends somewhat to discourage independent voting; and that for these reasons it is favored by the politicians.

Nonpartisan ballots. It is generally recognized that partisanship is to

be deplored in relation to judicial office and local offices. Consequently, in a number of states, candidates for such offices are now placed on the ballots in true Australian style; that is, without party designation. One would be foolish to say that this prevents all partisanship, but there is no doubt that it lessens the intensity of it and stimulates independent voting. In a few states candidates for public school superintendents are listed on a non-partisan ballot, and in Minnesota and Nebraska candidates for the legislature are so listed.

Separate ballots. Nearly all the states place the candidates for all offices on the same ballot. Several states, however, have separate ballots for different types of offices—national, state, county, and city. Thus, New York and Wisconsin use five ballots, Vermont seven; and it is said that at one time the voter had eleven different ballots in an Ohio election. Separate ballots may have some influence in the direction of independent voting, since they do in a physical sense separate candidates for the different types of offices. A number of states present initiated and referred measures to the voters on separate sheets, and thereby emphasize those questions as distinct from the election of officers.

Casting the ballot. We return now to our voter, whom we left in the polls while we were discussing ballots. When he has satisfied the election officials that he is duly qualified to vote, he is given the ballot or ballots and retires to the privacy of a booth to do the marking. An illiterate or physically incapacitated voter may have the assistance of election officials, and, in some states, the assistance of other voters, in marking his ballot. The marking being completed, the voter folds the ballot according to directions previously given and returns it to an inspector who, if he is satisfied that it is the same ballot that was given the voter, deposits it in the box.

Voting machines. In some states a mechanical device called a "voting machine" is used. It is a complicated mechanism, but like many other such mechanisms it is very easy to operate. The name of each candidate appears under a lever, and the voter indicates his choice by pulling the lever over the candidate's name. A number of states have the machines so constructed that an elector may vote the straight ticket by simply pulling down the lever of his party. The machine is enclosed by curtains, so that the voter has absolute secrecy in indicating his choices. If he votes in secret, what prevents him from operating the machine several times? The answer is that the machine records only the last movement of the levers, and it will not record that until the voter opens the curtain to leave the booth. The machine adds the votes as the levers are pulled for the various candidates, parties, or measures; so that when the polls are closed all that the officers have to do to learn the results of the election is to unlock the machine and read the totals. The chief advantages of the machines are: they can be operated more quickly than a paper ballot can be

marked; they are accurate; they are so constructed that a voter cannot spoil his ballot; the absolute secrecy of the ballot is preserved. The cost of installing machines is very high; but they are economical in the long run, because the large number of voters which the machines can serve makes possible a reduction in the number of election precincts and election officers. Then, of course, there are other savings, such as the cost of printing ballots and the price of ballot boxes. In spite of the obvious advantage of the voting machine over the paper ballot, it has been slow coming into general use. It is not available for any large percentage of voters, except in New York, Pennsylvania, and eight or nine other states. The chief obstacles to its adoption are: its initial cost; the distrust of a mechanical device which does not show how each vote is cast; and the determined opposition of corruptionists, who find the voting machine much more rigid in resisting election trickery and fraud than the paper ballot.

Counting the votes. With the closing of the polls, the counting of votes begins. We have just observed that where a voting machine is used there is nothing for the counting officers to do but unlock the machine and read the totals. Counting paper ballots is a tedious job, and it may occupy election officials, who have already been busy at the polls all day, through the better part of the night. Even honest election officers will grow weary and make mistakes. Party watchers who were annoyingly alert in the morning measurably relax their vigilance as midnight approaches. To lessen the strain on tired election officials, some twelve states have provided for special counting boards. These may begin their work a few hours after the polls open, and they will have the results totaled a few hours after the polls close. The count as announced from the many precincts gives us, unofficially, the results of an election. Several days later an official canvass is made by officers, usually county officials, designated for that purpose. These canvassing boards send all the election figures which relate to the state or districts larger than the county to the state canvassing board.

Absent voting. It always happens that many qualified voters are absent from their counties or states on election day. Nearly all of the states extend to certain classes of absentees the privilege of voting. A few states accord the privilege only to those absent in the military or naval service; a few other states allow any absentee the privilege; while the typical provision is that all those whose business or profession renders their absence necessary shall be entitled to the absent voter's ballot. About one fourth of the states allow those who are ill or physically disabled the privilege of absent voting. With respect to the distance a voter must be from his regular polling place in order to enjoy the privilege of an absent voter, the general rule is that he shall be outside his county but not beyond the

boundaries of the United States. Nine or ten states require the absentee to exercise his privilege on election day. The voter may go to any polling place in his state, make an affidavit, receive a ballot, and vote in the usual manner. The affidavit and the ballot are then forwarded to the election officers of the county in which the voter resides. The more common provision concerning the time and method of absent voting is that the absentee shall by affidavit apply to designated officers of the county in which he is a registered voter for the absent voter's ballot. The ballot is mailed to him, and he marks it. Upon receipt of the ballot, the absentee signs an affidavit and returns the marked ballot to the place of his registration, where it is counted with the other ballots on election day. The voters show scant appreciation of the legislatures' efforts, as very few of the tens of thousands who might avail themselves of the privilege of voting *in absentia* take the trouble to do so.¹⁷

VI. THE VOTER'S BURDEN

In our country we have placed ever-increasing burdens upon the voter. He is expected to choose presidential electors, members of both Houses of Congress, several executive officers of his state, state legislatures, judges in many states, and scores of county, city, and other local officers. Furthermore, we call upon the voter to nominate nearly all of these officers in the primary elections. But this does not end his task. He must vote upon state constitutions and their amendments in practically every state. In about twenty states he must vote upon ordinary bills which have been "initiated" or "referred." He is sometimes asked to pass upon city charters and ordinances. Finally, in some states and local areas he may be summoned to the polls to vote in "recall" elections. Formerly, a voter who did his best to exercise the privilege of the franchise in Chicago had to register twice, go to the polls five times, and weigh the merits of candidates for fifty offices within a year. The same type of voter in Colorado at a typical general election marks his ballot for candidates for thirty offices and votes on sixteen measures; while the faithful elector in Los Angeles performed the same operations for forty-five offices and fifty-eight measures in 1926.¹⁸ In 1930 the voter of San Francisco who did his full duty marked his ballot for some two score offices and thirty-nine measures, one of which was a proposed amendment to the city charter which would give a detective sergeant a right to a hearing before being transferred.¹⁹ Of course these are rather extreme cases; but the average ballot is far too long,

¹⁷ Brooks, *op. cit.*, pp. 452 ff.; Sait, *op. cit.*, 703 ff.

¹⁸ Spencer Albright, "How Does Your Ballot Grow?" (Bulletin, Am. Legislators' Association, May 10, 1933); Sait, *op. cit.*, pp. 681-682.

¹⁹ New York Times, Oct. 26, 1930.

listing from twenty to thirty offices, the greater number of which would be much better filled by appointment than by election. In states which employ the initiative and the referendum, the ballots usually contain some measures on which none but the most exceptional voters can express an intelligent opinion, and not infrequently they carry measures of such small consequence that they should be determined by minor public officials in the routine discharge of their duties.

The effect of the burden. It is perfectly obvious that the voter cannot discharge his duties intelligently. He may be able to inform himself concerning the qualifications of the candidates for important offices; but even the most conscientious and intelligent voter is practically helpless in an attempt to make a wise choice of candidates for the dozens of minor offices. All the voter can do is to vote the straight party ticket and hope that the party organization which vouches for the candidates has played no trick upon him. We hear a great deal of talk about the sovereign voter; but certainly when he leaves the polls after having voted for forty or fifty candidates, four fifths of whom he knows nothing about, he must feel like a very insufficient and helpless sovereign. Many of these sovereigns, oppressed with their feeling of dependence, have abdicated in disgust. Others, equally aware of the absurdity of their positions, but endowed with a sense of humor and faith in the fundamental principles of democracy, remain on the throne in the hope that conditions will improve.

The solution. The conditions can be improved, and they have been improved to some extent. The short ballot is the remedy. The ballot can be shortened by lengthening the terms of offices. Where four-year terms are substituted for two-year terms, the voter's job is cut in half. But the principal means of shortening the ballot is in the reduction of elective officers. Why should the people be asked to elect an inspector of elections, a public weigher, a clerk of a municipal court, a hide and animal inspector, and a host of others whose duties are technical and administrative? Our practical statesmen and students of government agree that there is no reason whatever for burdening the voter with such a task. They propose that the people elect such important political officers as governors, legislators, mayors, and councilmen; and that all other officers be appointed by the elected executive officers or by them in co-operation with the legislative bodies. As everyone knows, the only national officers elected by the people are the President and congressmen—all other national officers are appointed. It is proposed that the states and the local governments follow the national plan. Some of the states have taken measurable strides in that direction; many of the cities have done so. The short ballot is the only democratic ballot, if democracy has any relation to intelligent voting. The short ballot brings us responsible government, if, as is true in all business concerns, responsibility can be established by giving the chief officers the authority to name their assistants.

VII. CAMPAIGN FINANCE ²⁰

A fundamentally important phase of primaries and elections is that of finance. From what sources is party revenue derived? For what purposes is it expended? To what extent are campaign receipts and expenditures regulated by law?

Sources of party funds: 1. OFFICEHOLDERS. Party revenue is received from a variety of sources. In our discussion of these sources we shall follow Merriam and Gosnell.²¹ Those who hold office by virtue of party election or appointment usually contribute voluntarily or under pressure of the party organization. They are frequently assessed in the form of a percentage of the annual salary, 5 per cent being a commonly applied scale.²²

2. CANDIDATES. Candidates for office are usually assessed, especially the candidates for state and local office. The assessment may amount to 5 or even 10 per cent of the salary of the office sought. If a candidate is financially independent, he is expected to bear a larger part of the campaign expenses; and, in the case of important offices, rich aspirants are often willing to put up large sums.

3. PUBLIC-SPIRITED CITIZENS. Many contributions are made by public-spirited citizens interested in a particular candidate, issue, or party, who have no interest in the outcome of an election beyond the belief that the choice of certain candidates will be to the advantage of the city, state, or nation. These are pure gifts, with no strings attached. In a national campaign, tens of thousands make small contributions; a few hundred make large donations; while the largesses of a few men of great wealth may reach or even exceed \$50,000.

4. CONTRIBUTIONS FROM SPECIAL INTERESTS. A great deal of money has been contributed by individuals and corporations whose motives have been strongly questioned. Manufacturers eager for tariff protection, importers desiring the lowest tariff possible, oil men looking for government leases, railroads and other corporations wanting to be "left alone," have contributed handsomely to the party which seemed to offer the most direct benefits to their particular business. Concerns with business in several states have contributed liberally to the Democratic war chest in Democratic states and have served the Republicans equally as well in Repub-

²⁰ Brooks, *op. cit.*, Ch. XIII; Bruce, *op. cit.*, Ch. XV; Merriam and Gosnell, *op. cit.*, Ch. XVI; L. Overacker, *Money in Elections* (1932), and her articles on financing the campaigns of 1932, 1936, and 1940, in the *Am. Pol. Sci. Rev.*, XXVII, 776 (October, 1933), XXXI, 473 (June, 1937), and XXXV, 705 (August, 1941); J. K. Pollock, *Party Campaign Funds* (1926), and his "The Use of Money in Elections," in E. Logan (ed.) *The American Political Scene* (1936); Sait, *op. cit.*, Chs. XXIII-XXIV.

²¹ *Op. cit.*, pp. 362 ff.

²² Everyone is familiar with the refinement perfected by the Democrats in 1936, a plan by which office-holders were invited to party dinners at \$100 or less per plate, the major portion of this to be turned over to the party treasurer.

lican states. Where the parties have seemed to be fairly evenly balanced in national, state, or local campaigns, some contributors have divided large sums between them, with the idea of being in line for favors no matter which way the election went. E. L. Doheny and H. F. Sinclair thus "played both ends against the middle" in the presidential campaign of 1920. Samuel Insull was equally impartial in making contributions in an Illinois senatorial campaign in 1926.²³ Contributions of the type described in this paragraph have aroused the public conscience and led to some legal regulation of campaign gifts. We are to discuss this regulation presently.

5. CONTRIBUTIONS OF SERVICE. Parties receive a great deal of service which has money value, although it is not possible to measure it with any degree of accuracy. Nearly all the officeholders work for the parties during campaigns. Some of the time they give to the party is their own, but a great deal of it is taken from the hours in which they are supposed to be serving the public. In a national campaign the money value of the work of officeholders certainly runs well into the millions. The money value of the work of tens of thousands of enthusiastic and, for the most part, unselfish volunteers cannot be calculated. Nor can we estimate in terms of dollars and cents the value of the enormous publicity given the party and its candidates in the news columns and on the editorial pages of the press. Similarly, it is impossible to calculate the value of the support a party or some of its candidates may receive in a particular campaign from reform organizations, good government associations, groups of capitalists, laborers, farmers, and many others.

Cost of campaigns. It is estimated that in normal times a national campaign costs the major parties about \$10,000,000 each. The reports of the national committees will show something like half the amount mentioned,²⁴ but these reports will not show the expenditures of political and quasi-political organizations in the states. State campaigns in commonwealths the size of New Jersey or Indiana may cost \$100,000 or more. The cost is much higher in the largest cities, where it is said to range between

²³ Bruce, *op. cit.*, p. 425.

²⁴ The expenditures of the national committees, (not the total expenditures of the parties) in recent years has been as follows:

Year	Democratic	Republican
1928	\$5,342,350	\$6,256,111
1932	2,245,975	2,900,052
1936	5,194,741	8,892,972
1940	2,783,054	3,451,310

These figures are from Overacker, "Campaign Finance in the Presidential Election of 1940," *Am. Pol. Sci. Rev.*, XXXV, 705 (August, 1941). Grim necessity, the depression, held down the expenditures of the national committees in 1932, and the Hatch Act accounts for the reduction in 1940. In the latter year, however, much more money than usual came in from other sources. Overacker estimates that the Democratic party actually spent \$5,855,082 and the Republican \$14,941,142.

\$200,000 and \$1,000,000.²⁵ Primary campaigns are sometimes as expensive or even more expensive than election campaigns. Some \$200,000 was spent by or for Senator Newberry in the Michigan primary in 1918. Still larger amounts were spent by McKinley and F. L. Smith of Illinois, and Pepper and Vare of Pennsylvania in the senatorial primaries of 1926.²⁶

What the money goes for. Much more important than the amount received and certainly equal in importance to the source of party revenue are the purposes for which it is expended. Money from corrupt sources may be spent for the most legitimate purposes; donations of the most upright citizens may be distributed for the most shameful purposes. It is doubtful, however, if much money is spent by either of the national committees for "shameful purposes," although some money spent by local organizations may be for such purposes, and the national organizations might reap a little benefit from such expenditures. Here are the principal items for which the parties spent their money in the national campaign of 1940. Radio: Democrats \$387,224; Republicans \$335,000. Transportation: Democrats \$57,569; Republicans \$133,000. Printing: Democrats \$158,527; Republicans \$184,460. Salaries of clerks, copyists, messengers, and other employees ran to a large figure—to \$361,986 from June to December at Republican headquarters.²⁷ Telephones, telegraph, advertising, rent, and many other entirely legitimate services take large sums of money. It is a fact that millions may be spent in a national campaign for purposes wholly pure and upright. At least two million dollars would be required to send a letter to every voter in the United States.

Election-day expenses run very high, in cities sometimes as high as 50 per cent of the total campaign outlay. For getting out the voters and other election expenses, a party may spend from \$100 to \$500 or even more per precinct. It is said that much less money is used for out-and-out bribery of voters than formerly. The risks incurred and, we hope, quickened consciences, have very measurably decreased such gross forms of pecuniary corruption in elections.

Legal regulation of campaign funds. Because campaign funds were found all too often to come from business organizations or individuals who seemed to expect public favors, and because a part of the funds were expended for illegitimate purposes, both the national and state governments have attempted to regulate party finance.

1. **SOURCES.** First, contributions from certain sources are forbidden. Urged by Theodore Roosevelt, Congress in 1907 made it unlawful for a national corporation or a national bank to contribute money for any campaign, and for any corporation whatever to contribute for any cam-

²⁵ Merriam and Gosnell, *op. cit.*, pp. 370-371.

²⁶ Bruce, *op. cit.*, pp. 310 ff.

²⁷ Overacker, "Campaign Finance in the Election of 1940," *Am. Pol. Sci. Rev.*, XXXV, 706-707 (August, 1941).

paign in which national office is sought. But members of corporations may, of course, contribute as individuals. About three fourth of the states prohibit contributions from corporations. Something over one fourth of the states prohibit the assessment of officeholders.

2. PURPOSE OF EXPENDITURES. A second type of regulation is with regard to the character of expenditures. The laws vary greatly from state to state, but practically all states prohibit certain types of expenditures. Typical illegal expenditures are: purchasing votes; supplying voters with meat, drink, and entertainment during the campaign; hiring vehicles for the purpose of taking voters to and from the polls; hiring assistants other than challengers and watchers on election day; paying a voter's poll tax (in the South); purchasing the influence of a newspaper for candidates.

3. AMOUNTS OF EXPENDITURES. In the third place, there are numerous laws restricting the amounts which may be spent by or on behalf of candidates. The federal law of 1925 limits a candidate for the Senate to \$10,000 and a candidate for the House of Representatives to \$2,500. The law provides an alternative plan by which a candidate for either House may spend three cents for each vote cast in the last election for the office he seeks, provided the amount does not exceed \$25,000 for a seat in the Senate or \$5,000 for a seat in the House of Representatives. Where a state in which a candidate seeks election to Congress has a more restrictive law relative to expenditures, then the candidate must comply with the provisions of that law. Everyone knows that much more money is sometimes spent in senatorial or congressional campaigns than the amounts fixed by the federal act. How does it happen? It happens because personal expenditures for travel, stationery, postage, telegraph, telephone, and some other items do not come under the terms of the act. Furthermore, and more important, the act does not prohibit the expenditures for campaign purposes by persons other than the candidates. Finally, the act of 1925 applies only to election campaigns. The famous *Newberry* case (1921)²⁸ cast grave doubt over the question of the power of Congress to regulate its own primary elections, and Congress seems to have assumed by the act of 1925 that it had no such power. However, in a recent decision,²⁹ dealing with a different question, the Supreme Court of the United States appears to take the position that Congress has ample power to regulate its primaries.

Three fourths of the states have laws limiting the amount which may be spent by or for a candidate. The more rigorous provisions of the laws commonly apply, however, only to expenditures by the candidate, leaving others, either by subterfuge or by the actual terms of the law to spend amounts many times greater than those the candidate is authorized to spend.

²⁸ *Newberry v. United States*, 256 U.S. 232.

²⁹ *United States v. Classic*, 313 U.S. 299 (1941).

The Hatch Acts. By far the most discussed of the acts of Congress designed to curb "pernicious political activities" are the Hatch Acts. For years the Federal Civil Service law has given employees under the merit system some measure of protection from any political pressure their partisan superiors might desire to exert upon them, and the law has placed restraints upon the voluntary partisan activity of these employees. But, until 1939, there was no law to prevent the exertion of political pressure and coercion upon officers and employees who were not under the merit system, or upon the hundreds of thousands who were on some type of relief; nor was there any law to prevent the voluntary entry of these people into the "great game of politics." In the election years of 1934, 1936, and 1938 partisan activity in relation to the voters on relief was particularly prominent. In the summer of 1938 Deputy Administrator Aubrey Williams said to an audience composed largely of W.P.A. workers: "We've got to stick together. We've got to keep our friends in power."³⁰ Gratitude undoubtedly leads a majority of such employees to support their "friends," but some employees probably felt that they should be grateful to the United States rather than to the party which happened to be in power. At any rate, some political leaders were afraid to leave the matter of the party affiliation of relief workers to be determined by gratitude alone. It seems that W.P.A. workers in Pennsylvania were solicited for funds, and in some cases they were ordered to change their registration from Republican to Democrat. In Kentucky there was much manipulation of the W.P.A. organization and considerable coercion of its employees on behalf of Senator Barkley who, in 1938, was hard-pressed for re-election. Tennessee and New Mexico have had their "politics-in-relief" scandals, and many other states have had small scandals or near-scandals.

As early as 1932 Senator Hatch, a Democrat from New Mexico, became concerned over the amount and intensity of political activity on the part of federal office-holders who were supposed to be giving their full time to the problems of governmental administration. Political abuses under the relief setup greatly strengthened his purpose to do something about it. His great opportunity came after the scandals of 1938 and after the President had stated that legislation was necessary. The Senator persuaded his fellow solons to approve his bill to "prevent pernicious political activities." It was predicted that this bill would never pass the House of Representatives unless its "teeth were drawn." But, much to the surprise and dismay of seasoned politicians, it came from the House a stronger bill than when it entered. Originally the measure was planned to keep national elections clean; as amended it covered primaries and conventions as well as elections. On August 2, 1939, with some misgivings, the President signed it.³¹

The more significant provisions of the act declare it is unlawful: (1) for

³⁰ Senate Report No. 1 (1939), Part I, p. 32.

³¹ United States News, August 7, 1939, p. 6.

any person employed in the executive branch of the government, except a few designated high administrative officials, to use his official authority to interfere with a national election, or to take any active part in political campaigns; (2) for any person in a federal administrative position to use his authority to affect the nomination or election of presidential or congressional candidates; (3) for any person, directly or indirectly, to promise public work or other benefit as a reward for political activity, or to deprive or threaten to deprive any person of such benefit as a penalty; (4) for any person to solicit or receive any political contribution from persons benefiting from funds appropriated by Congress for work relief or relief purposes.

In 1940 Senator Hatch presented a bill calling for further reform in campaign practices, a proposal to remove from political activity state officials and employees whose salaries are paid, even in part, by the federal government. After tragic lamentations from nearly all of the senators who had the support of powerful state machines, and expressions of pure politics sentiments by senators against whom machines had operated or might operate, the Senate passed the bill. It remained in the House three months, and it was assumed to be dead; but it was eventually enacted into law. The feature of the bill which attracted the widest attention was that limiting the amounts of contributions to political organizations and the amounts which might be expended by those organizations. In the language of the act "no political committee" shall receive contributions or make expenditures in excess of \$3,000,000, and no individual may contribute to such committee a sum in excess of \$5,000. But how many committees, national, state, and local, may a party have, and to how many committees each may an individual contribute \$5,000? That is where the joker is. The Republicans established fifteen state finance committees, and the Democrats proceeded along similar lines, each *party committee* adhering strictly to the prohibition against receiving and spending more than \$3,000,000! The law is rather clearly a farce. The combined Democratic organization and their nonparty committees and clubs raised \$5,855,000 and the same type of combination raised \$14,941,000 for the Republicans.³² It is quite true that it is most difficult to draft a statute that will prevent large expenditures of money in elections, but it can hardly be said that a serious effort was made in the case of the second Hatch Act.

4. THE REQUIREMENT OF PUBLICITY. A fourth method of regulating campaign funds is through the requirement of publicity. The fear of the light of day no doubt causes some corrupting sources to withhold contributions and prevents some questionable disbursements on the part of candidates and their backers. The national government and practically all the states now require some sort of publicity. Both candidates and parties are ordinarily required to file statements; but in about one fourth

³² Overacker, "Campaign Finance in the Election of 1940," *Am. Pol. Sci. Rev.*, XXXV, 708, 713 (August, 1941).

of the states only the candidates are required to file, thus inviting evasion of the law. Formerly, very few states required publicity before the election, leaving the voter without information which might have changed his vote. The national law requires publicity both before and after elections, and the present tendency in the states is in this direction.

It cannot be said that these regulations have cured the evils of campaign finance. They are difficult to enforce, and in many states only indifferent attempts are made to enforce them. There is no doubt, however, that these corrupt practices acts, particularly those parts relating to publicity, have improved the financial standards of primary and election campaigns. If party organizations and individuals have no great fear that the penalties prescribed for violations of the corrupt practices acts will be imposed, they do have some fear of the political disasters which might be visited upon them by voters whose political morals have been quickened to a considerable degree by discussions of those very acts.

Publicity pamphlets. Attention to the subject of campaign funds has led to proposals that the governments bear a large part of the campaign expenses and rigidly limit private donations and expenditures. It is argued that this would remove many of the evils of money in politics; that, in particular, it would give rich and poor men and rich and poor parties a more nearly equal chance for office. In 1907 Theodore Roosevelt proposed that Congress provide for legitimate campaign expenses of each of the great national parties. Congress was not impressed, but the legislature of Colorado adopted the Roosevelt plan in a more rigid form than he had proposed. The act was declared unconstitutional by the state Supreme Court before it went into effect. Bryan, at the Democratic national convention in 1920, unsuccessfully urged his party to go on record as favoring a national bulletin to be published jointly by the two leading parties at government expense and mailed to every qualified voter. Several states have provided that parties and candidates may set forth their case to the voters through "publicity pamphlets" issued by the state. For example, the Oregon law of 1909 provides that the state shall issue a publicity pamphlet for the primaries of each party; that any person seeking nomination may have as many as three pages in the pamphlet at a cost of \$100 per page for the most important offices and less for the other offices; that other persons may have the same use of the pamphlet in opposing a nomination; and that the state shall mail a copy of the pamphlet of each party to the voters of that party. The law also provides for publicity pamphlets for the election campaigns. This pamphlet contains the arguments for all the parties and all the candidates at a nominal cost to them, and is mailed to each voter in the state.³³

For reading list, see references at the end of Chapter 8.

³³ Sait, *op. cit.*, pp. 524, 654 ff.

The President: The Nature of His Office; His Executive Powers



In the preceding chapters we have examined the groundwork of American government, discussed constitutions, learned something about interstate relations, reviewed the rights of persons and the privileges of citizens, and surveyed the history and organization of political parties, giving particular attention to their great functions of nominating and electing candidates to public office. We now direct our attention to the organization and functions of government in the United States. This is commonly done by devoting chapters to the great divisions—executive, legislative, and judicial—of the national government; then following with another group of chapters treating the states in the same way, and concluding with a third group which disposes of the local governments. Our method is somewhat different. We shall deal first with the chief executive, national and state. The legislative and judicial branches of those governments will then be treated in the order named. Local government, since it has to do primarily with administration, will be given brief attention in the chapter on state and local administration. In other words, our approach is functional rather than territorial. We begin, then, with the executive functions; the present chapter being devoted, first, to the general features of the office of President; second, and more important, to the President's executive powers.

I. TERM, QUALIFICATIONS, IMMUNITIES, SUCCESSION ¹

The single executive. It will be recalled that the Articles of Confederation established only a Congress, and that executive powers were exercised by that Congress or its committees. This proved to be so inadequate that the members of the Constitutional Convention were practically unanimous in approving a separate executive branch for the national government. Although the framers of the Constitution differed materially and long on some questions relating to the executive, they experienced no

¹ E. S. Corwin, *The President: Office and Powers* (1940), Ch. II; O. P. Field, "The Vice-Presidency of the United States," *American Law Review* (1922), LVI, 365-400; J. M. Mathews, *The American Constitutional System* (1940 ed.), Ch. X; Mathews and Berdahl, *Documents and Readings in American Government* (1940 ed.), pp. 207-217; Orth and Cushman, *American National Government* (1931), Ch. VIII.

great difficulty in reaching the decision to establish a single rather than a plural executive. The plural executive, or executive council, is employed in Switzerland, where the executive department is subordinate to the legislature, and it seems to work satisfactorily. But our executive was made co-ordinate with, not subordinate to, Congress and to have entrusted wide and independent powers to a plural executive would have been a fatal mistake. The single executive provides at least two essentials—it unifies command, and it definitely locates responsibility.

Term and tenure. The members of the Philadelphia Convention had some difficulty in fixing the length of the term of office for the President. A few favored life tenure, but the majority favored a fixed number of years. A single term of seven years was carefully considered, but the four-year term with the privilege of election for an additional term or terms was finally agreed upon.² Although the written Constitution does not limit a President in the number of terms he may serve, until 1940 custom limited his tenure of office to two terms. Washington and Jefferson both declined the honor of a third term, and thus started the two-term tradition. Grant, having served two terms (1869–1877), unsuccessfully sought the nomination in 1880 for a third. The two-term precedent was still more definitely established when Theodore Roosevelt, having served McKinley's unfinished term and the one for which he was elected in his own right (1901–1909), was rejected by his party for the nomination in the summer of 1912, and by the country in November of the same year as a Progressive candidate for President. The most recent contribution to the two-term tradition came in 1928, when Coolidge did "not choose to run." Neither Theodore Roosevelt nor Coolidge had served two full terms, but the prevailing opinion seems to be that he who has twice taken the oath of office has served two terms. In 1940 the world crisis and the political astuteness of Franklin D. Roosevelt enabled him to break the two-term tradition with relative ease.

Removal from office. Several of our Presidents have died in office. None has resigned, although there is no question of the existence of the right to resign. Indeed, it would seem that in the case of a President who is hopelessly incapacitated, there is a duty to resign. The Chief Executive or any other civil officer of the United States may be removed from office "on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." The House of Representatives has the sole power of impeachment, that is, to make the charges; and the Senate has the sole power to try impeachments. The Chief Justice presides over the Senate when the President is tried. Andrew Johnson was the only President to be impeached, and the Senate failed by one vote to cast the necessary two-thirds majority for his conviction.

² From time to time, especially in 1912–1913, there has been some discussion of the desirability of a single six-year term, but there seem to be no prospects of its early adoption.

Qualifications. The Constitution states that: (1) "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; (2) neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and (3) been fourteen years a resident within the United States."³ The provision "or a citizen of the United States at the time of the adoption of this Constitution" was included in order to qualify for the presidency Hamilton, James Wilson, and other founders of the Republic who were foreign-born. We are not disposed to quarrel over the present rigid requirement of nativity; but we must observe that a foreign-born citizen may have talent and attainments and loyalty to his chosen country which in every way fit him for our highest office. There is no likelihood that the other requirements will operate to deprive the country of the services of those who are otherwise qualified. When Herbert Hoover was first discussed for the chief magistracy, a few people offered the objection that his long residence abroad during some of the fourteen years preceding the time he would take the oath of office, if elected, would disqualify him. This objection was not well founded; for the clause of the Constitution quoted above, which merely specifies "fourteen years a resident within the United States," clearly cannot be interpreted to require residence within the United States during the fourteen consecutive years preceding the date the oath of office is taken.

Compensation. "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."⁴ Congress originally fixed the salary at \$25,000 a year, increased it to \$50,000 in 1871, and to \$75,000 in 1909. The prohibition of "other emolument" is not interpreted to mean that the President shall not be furnished with an official residence, executive offices, travel and other allowances, totaling about \$300,000 per annum.

Personal immunities. The President, like heads of government the world over, enjoys complete personal inviolability. No officer has the authority to arrest him, no matter how grave his crimes may be; no court may subject him to its jurisdiction, not even the Supreme Court of the United States. As indicated above, he is subject to impeachment; but the Senate has no authority to compel him to appear before it in his impeachment trial. In the event that the Senate votes for conviction in an impeachment proceeding, the President becomes a private citizen, and is then subject to ordinary judicial process.

Presidential succession. Neither the German Republic, which Hitler

³ Art. II, sec. 1, cl. 4. Availability, to be distinguished from legal qualifications, was discussed in Ch. 8, sec. I, subsec. D.

⁴ Constitution, Art. II, sec. 1, cl. 6.

terminated, nor the French Republic, which he crushed, had a vice president. Their constitutions stipulate that when a president resigned, or was removed, or died in office, a new president should be elected. This new president was elected for a full term (seven years), not just to fill out the unexpired term of his predecessor. Our Constitution provides that presidential elections shall be held only at regular four-year intervals, and this necessitates the provision for a Vice President who shall complete the unexpired term of a resigned, removed, or deceased President. The Constitution also stipulates that the Vice President shall serve when the President is unable to discharge his duties.⁵ To date, the President seems to be the sole judge of his ability to discharge his duties. Garfield was physically unable to discharge his duties after he was wounded by an assassin, but he continued to be President until his death more than two months later. In like manner, Wilson, lying almost at death's door, continued as President in 1919-1921. Absence from the country does not constitute inability to discharge the duties of President, as was demonstrated by Wilson's trips to Europe in 1918-1919.

The Act of 1886. Suppose death, resignation, removal, or inability leave the country without either President or Vice President, who then becomes President? The Constitution gives Congress the authority to declare what officer shall be President in such contingencies.⁶ The latest act of Congress on this subject is the Presidential Succession Act of 1886. It provides that the Cabinet officers in the order of the seniority of their departments—State, Treasury, and so on—shall succeed to the presidency. The Vice President, or any officer who becomes President under the act of 1886, must meet the requirements of age, citizenship, and residence which are laid down in the Constitution for the office of President. Six Vice Presidents have succeeded six Presidents who died, but the succession has never run beyond the Vice President.

The Vice President. We learned when we were discussing nominations that the person named as the vice-presidential candidate is usually one who is expected to win votes from a disgruntled faction, carry some doubtful state, or serve similar political purposes. Sometimes the honor goes to some second-class but "regular" political veteran. In a few cases, men of the highest talents have filled the office of Vice President; but ordinarily the place seems to be reserved for second-rate men. This is unfortunate, in view of the fact that there is considerable likelihood of the Vice President's being called upon to take over the reins of government. The office carries a salary of \$15,000, an amount hardly sufficient to maintain the second man in the Republic on a scale befitting his position. Some men who have held the office have felt the need of accepting substantially reduced rates on suites of rooms in Washington hotels.

⁵ Art. II, sec. 1, cl. 5.

⁶ *Ibid.*

PRESIDES OVER THE SENATE. The Vice President has the duty of presiding over the Senate, but as its presiding officer he does not have the power or the influence the Speaker of the House of Representatives enjoys in the other wing of the Capitol. He is not a member of the Senate, nor has he a vote on its measures except in case of a tie. Mr. Dawes as Vice President did his best to make something of his position as President of the Senate, particularly in trying to get a revision of the Senate rules. But in the matter of rules the Senate refused to be led or forced, and Dawes good-naturedly gave up the attempt. In his efforts to influence legislation he was less spectacular but slightly more successful. Vice President Garner, from his long legislative experience, was of considerable aid to the President in putting his program through Congress during the first years of the New Deal. Vice President Wallace seems to have made a most serious and conscientious effort to perform his duties in the Senate, and he frequently speaks (sometimes for the administration) to the American people and to the world on matters of long-term policy.

THE EXPERIMENT OF ATTENDING CABINET MEETINGS. The Vice President's chief duty is to be in readiness to succeed the President. His position as presiding officer of the Senate does not adequately prepare him for the succession. From time to time, Presidents and candidates for that office have discussed the importance of having the Vice President in attendance at Cabinet meetings, where he would learn something of large administrative problems and get an intimate view of the work and policies of the Chief Executive he might be called upon at any time to succeed. Although Washington asked Adams at least once to sit in his Cabinet, and some other Presidents often sought the advice of vice presidents, no Vice President sat regularly with the Cabinet until Harding asked Coolidge to do so in 1921. The position of Vice President Coolidge in the Cabinet was largely that of observer. There is evidence that Coolidge did not relish this position, and doubtless he had a sympathetic understanding of the motives which prompted Vice President Dawes to decline his invitation to sit with the Cabinet of the 1925-1929 administration.⁷ Recent Vice Presidents have sat in the Cabinet, but it is generally agreed that these efforts to increase the importance and prestige of Vice Presidents have produced no significant results. Upon being told that President Buchanan consulted Vice President Breckenridge only once, and then with regard to the phraseology of a Thanksgiving Proclamation, a later Vice President, with a saving sense of humor, is said to have replied: "Well, there is one more Thanksgiving Day before my term expires."⁸

The presidential inauguration. **THE LONG DELAY UNDER THE OLD PLAN.** Until the Twentieth Amendment was adopted, the President and Vice

⁷ Mathews and Berdahl, *op. cit.*, pp. 330-331.

⁸ *Ibid.*, p. 328. Quoted from (Bryan's) *The Commoner*, Nov., 1920.

President, for all practical purposes elected in November, did not take office until the following March 4. If the incoming administration was largely committed to follow the policies of the retiring one, this delay in the transmission of powers was not serious. If, on the other hand, the old administration had been repudiated by the people and a new Moses was growing restive waiting to lead the people to the Promised Land, the delay was open to grave objections. Under such circumstances, the retiring President might continue to act as if nothing had happened and risk embarrassing his successor by committing the government on important matters; or he might spend a very quiet winter in the White House waiting for March 4. The country almost went to ruin waiting for Lincoln's inauguration, while poor President Buchanan wept and prayed and wrote an essay on the Constitution. Taft and Wilson, both repudiated at the end of their terms, doubtless would have been just as happy to yield to the logic of events and to make way for their successors in December. President Hoover and President-elect Roosevelt made some attempts to co-operate in the winter of 1932-1933 but without conspicuous success.

JANUARY 20 THE NEW DATE OF INAUGURATION. It was suggested repeatedly that the President and the Congress chosen with him should take office shortly after election. The Twentieth Amendment, proposed in 1932 and adopted in 1933, brings the newly elected Congress into office on January 3 and the President-elect on January 20.

THE CEREMONY. We learned in a previous section that the party gives its candidate for President a ceremonious official notice of that fact. The President-elect is not, however, officially notified that he is the choice of the American people for the highest office within their gift. But the successful candidate learns that from the sources open to all other Americans, and he arrives in Washington a few days before the date of inauguration. Having previously called upon the retiring President to pay his respects, he rides with him to the Capitol on Inauguration Day, followed by many another official of the nation and the states, and cheered by wildly enthusiastic throngs. Outside the Capitol, on a temporary platform erected for the purpose (in the Senate Chamber, if the weather is inclement), the President-elect becomes President by taking the oath of office, administered by the Chief Justice: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."⁹ In the inaugural address, not required by the Constitution, the President usually tries to smooth over some of the ill-feeling which recent partisan strife may have caused, appeals to all good citizens to help him in his task, and outlines his program, sometimes

⁹ Constitution, Art. II, sec. 1, cl. 7.

rather specifically. President Franklin Roosevelt clearly indicated in his brief inaugural in 1933 that he intended to ask Congress to give him sweeping powers to battle with the Depression.

II. THE CABINET ¹⁰

Before the inauguration, the President selects his Cabinet. The importance of an advisory council did not escape the notice of the framers of the Constitution, but they thought the Senate would serve in that capacity. Consequently, the Cabinet is not mentioned in the Constitution. The nearest approach to it is found in the provision that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."¹¹ In addition to exercising this constitutional right, Washington soon found it convenient and desirable to take the heads of these departments into his confidence as a group. Before the end of his administration the Cabinet was established as the executive council, and the idea of using the Senate for that purpose was definitely abandoned.¹²

Appointment to Cabinet posts. The ten heads of the ten great executive departments who now compose the Cabinet are appointed by the President, "by and with the advice and consent of the Senate." The Senate usually accepts the President's nominations for these important posts without serious question; for it is realized that if the Chief Executive is to be responsible for the administration, he must be allowed a free hand in choosing his immediate assistants. The Senate's rejection of Charles B. Warren, whom Coolidge named for Attorney General in 1925, was most unusual and created a sensation. The senior executive department is the Department of State, and for this post the President usually names the man who ranks next to himself in his party. Thus, Lincoln appointed Seward, his chief rival for the Republican nomination in 1860; and Wilson felt the necessity of appointing Bryan, second to him in Democratic esteem, although he had once said that he would like to see Mr. Bryan knocked, "once for all, into a cocked hat." Other Cabinet posts go to men who have been largely responsible for the President's election (his campaign manager ordinarily becomes Postmaster General), to personal friends, to those who have marked administrative capacity, or to those whose appointment will give a particular section of the country represen-

¹⁰ M. L. Hinsdale, *History of the President's Cabinet* (1911); Pendleton Herring, *Presidential Leadership* (1940), Ch. V; H. J. Laski, *The American Presidency* (1940), Ch. II; H. B. Learned, *The President's Cabinet* (1912); Mathews and Berdahl, *op. cit.*, Ch. VII; Orth and Cushman, *op. cit.*, Ch. X; W. H. Smith, *History of the Cabinet of the United States* (1925).

¹¹ Art. II, sec. 2, cl. 1.

¹² C. A. Beard, *American Government and Politics* (1939 ed.), p. 147.

tation in the Cabinet, or, and more commonly, to persons who fall into two or more of these classes. Cabinet members are usually men who have been active in politics, although a relatively small number of representatives or senators are chosen. The present-day Cabinet is likely to contain some members whose interests have been primarily in private business, with only incidental or intermittent attention to politics. The personnel of a Cabinet depends, of course, to a considerable extent upon the motives and policies of the President who does the selecting. On occasion, a President may appoint men of an opposition party to Cabinet posts. The most recent example of this was the appointment (1940) of Henry L. Stimson as Secretary of War and Frank Knox as Secretary of the Navy. Both men were active Republicans, but both were in harmony with the President's defense policies.

Functions of the Cabinet. One must carefully distinguish between the functions of the heads of the ten executive departments, acting separately, and their functions when acting as a group—as a Cabinet. We reserve the work of the separate departments for Chapter 18. Here we are concerned only with the Cabinet. Its functions are purely advisory and consultative. It is the President's council. He may use it as much or little as he pleases. Jackson abandoned its use early in his administration, which he had a perfect right to do, and turned to a small group of political friends, his "Kitchen Cabinet," for advice. If the President wishes to use under-secretaries, assistant secretaries, members of independent commissions, and men with no official status as his advisers, no one may object on constitutional grounds. Wilson had his Colonel House, Franklin D. Roosevelt once had his Raymond Moley, at this writing his Harry Hopkins, and at various times he has had much advice from certain members of the Supreme Court, the Director of the Budget, the Director of the Office of Economic Stabilization, the Commissioner of Labor Statistics, a New York state judge, and from many others not of cabinet rank or even members of the federal administration. The President may consult with whom he will, singly or in groups.

The American people complained because Wilson, during his illness, did not call Cabinet meetings for long periods of time; but he need not have called them at all. While Wilson was ill, his Secretary of State, Robert Lansing, frequently called Cabinet meetings; and when the President learned of this he accepted Mr. Lansing's resignation. We may disagree as to the expediency of the President's treatment of Lansing, but we cannot deny his contention that the Cabinet belongs solely to the Chief Executive.

The Cabinet meeting. The Cabinet meets when the President calls it—ordinarily twice a week; and it considers only those matters which the President lays before it or which he agrees may be laid before it by one of its members. The Cabinet may spend its time telling stories, or discussing

trivial affairs, or weighing the gravest problems of state. If the President has confidence in his advisers, he will submit for their consideration important questions of policy, such as the recognition of Soviet Russia, the American adherence to the World Court, the production of armaments, Prohibition enforcement (or repeal), or relief of unemployment. Sometimes, of course, there are no matters of paramount importance pending, and at other times the President may be disposed for one reason or another, to keep his own counsel on important policies for which he is responsible. Franklin K. Lane, who sat in Wilson's Cabinet, tells us of meetings devoted to petty affairs when the President was handling alone our very perplexing and very serious troubles with Mexico and Germany.¹³ In the Cabinet meetings, conditions are most favorable for the fullest and freest discussion; for the sessions are secret and no minutes are kept. Men may "get down to business" without any great concern over the political effect of their statements. Important Cabinet secrets not infrequently leak out in the course of time, however, as one did in 1830, when President Jackson promptly "excommunicated" Vice President Calhoun upon learning that, as Secretary of War under President Monroe in 1818, he had recommended that disciplinary action be taken against the then General Jackson for his high-handed conduct in his Florida expedition. Votes are seldom taken on questions discussed in the Cabinet, and, if a vote is taken, it is only a vote of advice for the President. Following Lincoln's procedure on one occasion, a President may announce the vote: "Ten nays, one aye [the President's]; the motion is carried."

The Cabinet and Congress. Congress has no legal control over these men sitting in a group forming the President's Council; for that Council, as we have learned, is unknown to the Constitution—is based on custom and not on law. Its deliberations are as much closed to Congress as they are to the American public. The President's communications with his Cabinet are as private, as far as the legal authority of Congress to pry into them is concerned, as his conversations with his personal friends. Jackson, who did so much to increase the importance and independence of the President, had a characteristic word for the Senate when that body asked for a copy of a statement on the removal of federal deposits from the Bank of the United States, which he was supposed to have read in a Cabinet meeting. "I have yet to learn," he wrote, "under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication; either verbally or in writing, made to the heads of departments acting as Cabinet council."¹⁴ The authority of Congress in the matter of the removal of the heads of departments

¹³ See quotations from his letters in C. A. and Wm. Beard, *The American Leviathan* (1930), p. 263.

¹⁴ Quoted in C. A. Beard, *American Government and Politics* (1939 ed.), p. 148, from J. D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, III, 36.

(Cabinet members) from office falls more appropriately into another section of this chapter. For the present, we simply state that Congress has no such authority except through impeachment. We must note also that Congress has no authority whatever to interfere with the President's right to dismiss at any time a department head. .

III. A GENERAL VIEW OF THE PRESIDENT'S POSITION AND DUTIES

The President and politics. We will lose sight of an important fact if we do not bear in mind that the President's position is political. In discharging his duties it is not enough that he follow the clauses of the Constitution, the principles of sound economics, and the accepted standard of morals; but he must give attention to national tradition, sectional pride, political ambitions, and party harmony, to mention only a few items not included in any of the three categories named above. In other words, he must consider the political effect of his acts.

It is bootless to deplore these facts; no method has yet been devised for removing the politics from a political job. We must recognize the necessity for politics in the President's office; and as we recognize that necessity we can understand why some very fine men, exceptionally capable in large affairs other than politics, may make very poor Presidents. Of great significance is the fact that our four great Presidents between 1860 and 1932—Lincoln, Cleveland, Theodore Roosevelt, and Wilson—were astute politicians.

The President is the center of the citizen's political interest. The President holds the center of the political stage. We have already given considerable space to the drama of his nomination and election. His conduct, private as well as public, is of the greatest interest to his fellow countrymen. His messages and addresses are heard or read by tens of millions; and so are the reports concerning his luck at fishing, his favorite exercise, his pets, and so on. The average citizen who goes to Washington may spend hours in the hope of getting a glimpse of the President, and he returns radiant with pleasure if he manages to shake the Chief Executive's hand. When on a tour of the country, the President will ordinarily be greeted at stopping places by great throngs; and if he should happen to toss the butt of a cigar into the gutter he is likely to witness the unedifying spectacle of a mad scramble on the part of his admirers to recover it. Perhaps the citizen should be much more interested in his mayor or in his children's primary teachers; but he is not, although they touch him much more vitally than does the President. The keen interest manifested in everything the President does is due to the fact that he not only wields large powers but also is the ceremonial as well as the actual head of the state. He must feed the sentiment which even Americans

have for the Chief of State. He is the living symbol of the United States as the King is the symbol of the British Commonwealth of Nations.

His duties summarized. Somewhat analogous to the duties which the King of England or other members of the royal family perform for the nation are the ceremonial and quasi-public duties of the President of the United States. He receives and congratulates scientists, inventors, and other public benefactors; delivers addresses before patriotic, fraternal, and other organizations; and sends greetings to scores of societies in national conventions assembled. He must issue Thanksgiving Proclamations, and recommend the work of various charitable and humanitarian enterprises as worthy of support. He must give state receptions and dinners, find time for an audience with small boys who have won oratorical contests or debates, and shake hands with long lines of his fellow countrymen.¹⁵ He is called upon to open fairs, tunnels, and bridges; to dedicate memorials and dams; and to do a host of other things, some important, some irksome and annoying, and many trivial. In the second place, there are duties and obligations which come to the President, not from any particular clause of the Constitution, but rather from the sum total of the powers conferred upon him plus the prestige and influence his position carries. We expect the President to take the lead in solving an unemployment problem, in encouraging manufacturing and industry, in promoting national thrift, and what not. Some Presidents have been charged with having made statements to help the stock market and prevent passes in dividends. In the third place, we have those great powers, executive and legislative, which are granted to the President by the Constitution and by statute and which are often still further increased by aggressive executives. The legislative powers are discussed in the next chapter. The remaining portion of the present chapter deals with the executive powers—the powers to direct administration, make appointments and removals, conduct foreign affairs, and grant pardons. The President's power to command the Army and Navy, essentially an executive power, is reserved for Chapter 26, "The United States at War."

¹⁵ Hand-shaking is said to be one of the symbols of the democratic foundation of our government. Although it is a very severe strain upon the President and the First Lady of the Land, there is no indication that it will be abolished. At some of these receptions three or four thousands are present and it takes them hours to pass by. The First Lady may wear gloves which "grow grey with the grime of democracy" as the long lines file past, but the President must take his democracy without gloves. "The state of mind that this endless line of strangers induces in the people it passes is emphasized by everyone who has had a part in these great receptions. . . . It is told of [Theodore] Roosevelt that a man whose face seemed very familiar stood before him at a moment when the attention of the introducing aide was distracted. Mr. Roosevelt was trying to place him, when the man leaned forward and said in a friendly whisper, 'Made your shirts, sir.' Whereupon the President, not hearing clearly, but feeling relieved, grasped him warmly by the hand and said, 'Delighted to see you again, Major Shurtz.'" (Mildred Adams in *The New York Times*, Magazine Section, Nov. 30, 1930, p. 9.) This story goes back to Andrew Jackson and his "Major Boots."

IV. THE PRESIDENT AS CHIEF OF ADMINISTRATION¹⁶

His constitutional authority. The Constitution calls upon the President to "take care that the laws are faithfully executed." It also gives him the authority to require the opinions of the principal officers of the executive departments upon subjects relating to the duties of their offices.¹⁷ This is as far as the Constitution goes in direct language toward making the President the director of administration. However, it gives him several other powers, such as the authority to command the Army and Navy and to make appointments to public office, which have gone far to make him the chief of administration.

His statutory authority. The earlier Congresses did not intend that the President should be the administrative chief, having authority to control and direct subordinate administrative officers of the national government. The Congress, in establishing the first executive departments, left the President a general controlling authority in the political departments—Foreign Affairs and War; but the Treasury Department was to be subject to the direction of Congress, and its Secretary was required to make his annual reports to that body, not to the President. When the Post Office Department was first organized, it was also placed under congressional direction. In other words, the original policy was that the President should be primarily a political chief, with the authority to perform political functions, that is, functions not subject to judicial review; but that Congress should be the guiding force in directing administrative affairs. In the course of time, Congress learned that efficient government was not easy to maintain unless the President were given wide discretion in administrative affairs. Consequently, in the past thirty or forty years Congress has steadily increased the President's discretionary powers. Important acts are passed in which only the general principles are laid down, the details of their application being left to the President. For several years, Congress left the President to manage the newly acquired Philippines practically as he saw fit. In like manner, Congress instructed the President to govern the Panama Canal Zone in his own way during the period of the construction of the Canal.¹⁸ Our reciprocal tariff is another illustration of the congressional practice of leaving discretion in the hands of the President. A very free rein indeed is given to the President in war time and in periods of emergency. Thus, during the World Wars, Congress gave the President sweeping powers over the industries and resources of the country and, during the depression, gave Roosevelt most extensive authority.

¹⁶ Corwin, *op. cit.*, Chs. III-IV; W. W. Willoughby, *Principles of the Constitutional Law of the United States* (1930 ed.), Chs. LXX, LXXVI.

¹⁷ Art. II, sec. 2, cl. 1.

¹⁸ J. T. Young, *The New American Government and Its Work* (1933 ed.), pp. 107-108.

Administration of laws. When the citizen thinks of law enforcement he probably thinks of the activities of the federal executive and judicial officers in bringing "dope" smugglers, interstate automobile thieves, and illegal business combinations to justice. This is, of course, a significant phase of law enforcement, but it is just one phase of the problem. Viewed broadly law enforcement includes the administration of all laws, laws relating to the property of the United States, the promotion of health, the protection of American citizens abroad, the distribution of the mails, the construction of highways, the building of dams, the maintenance of parks, the relief of veterans, and so on to an infinite and bewildering variety of laws. Obviously, federal marshals, attorneys, and courts play only a small part in enforcing the great body of federal statutes. The services of these officers are needed only for the more extreme cases, cases in which there is definite resistance to the laws. The day-to-day administration of law is the work of department heads and their subordinates, of boards and commissions and their tens of thousands of employees, nearly all of them acting within the "chain of command" which reaches down from the White House. As Chief Administrator the President fixes the tone and temper and spirit in which the laws are applied. He may direct that some statutes be enforced or administered with vigor, others with moderation, and some only by an occasional demonstration or example.

The President's administrative staff. The Chief Administrator has so many and such diverse duties to perform that he must have help, help far beyond that which the secretaries and clerks who have always been about the White House are able to give. He needs an administrative staff. Until very recently he had none. His Committee on Administrative Management strongly recommended that one be established, and the President carried out the essential features of that recommendation. Under Executive Order of September 8, 1939, the Bureau of the Budget, the National Resources Planning Board, and several other administrative agencies were placed within the Executive Office of the President. Of particular interest is that part of the Order which called for administrative assistants to the President. These assistants are personal aids to the President and they have no authority over anyone other than the personnel assigned to their immediate office. At this writing (November, 1943) the Director and Assistant Director of the Budget, officers of other staff agencies, and three or four assistants to the President collect and digest information and statistics, make and submit plans, advise and confer with the President, write administrative rules and regulations, and in various other ways, as the President may direct, serve the Executive arm of the Government. These men do not relieve the President of his responsibility as chief administrator; rather do they, by taking care of many details and supplying him with expert advice, make it possible for him to discharge his true functions as supreme administrator. The relationship

of the President and his staff is very similar to that with which the public is familiar in large business enterprises. The principal executive of the firm, relying upon his experts or "brain trusters" for facts, figures, and technical advice, makes the decisions and "takes the rap." We accept this in business without question. There is no good reason for fearing it in government.¹⁹

V. THE POWER OF APPOINTMENT AND REMOVAL ²⁰

Appointments. Closely associated with the power of Chief of Administration is that of appointment and removal. The Constitution provides that the President shall, with the approval of the majority of the Senate, appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and other public officers of the United States. It provides further that Congress may vest the appointment of such inferior officers as it thinks proper in the President alone, or in the courts of law, or in the heads of the executive departments. Since the Constitution does not define "inferior officers," Congress may itself determine what officers are in that class and provide for their appointment by one of the three methods just mentioned. In practice, Congress has shown a strong disposition to vest in the President and the Senate the appointment of important officers not mentioned in the Constitution. By the term of the Constitution and acts of Congress, about 16,000 federal officers, including practically all of the important ones, are appointed by the President and the Senate. The great majority of approximately 2,500,000 "inferior officers," who for the most part are concerned with routine and nondiscretionary administrative duties, are appointed by the heads of departments. The remainder are named by the President alone, or by the courts. We are concerned in this section with those officers who are chosen by the President and the Senate. Chapter 20 deals with the selection of the great army of federal employees.

THE SENATE AND MAJOR APPOINTMENTS. Although the words of the Constitution give the Senate equal authority in all appointments which that body shares with the President, the practice is quite different. In appointing the heads of departments, ambassadors and ministers, and high military or naval officers, the Senate gives the President practically a free hand. Usually, even if the opposing party controls the Senate, the President's nominees are accepted. Since the President is held responsible for the executive and administrative functions of the government, the policy of the Senate in allowing him the widest freedom in choosing his chief assistants is in accordance with the basic principles of fair play. The

¹⁹ Herring, *op. cit.*, pp. 109-110; Mathews and Berdahl, *op. cit.*, pp. 291 ff; Laski, *op. cit.*, pp. 252 ff.

²⁰ E. S. Corwin, *The President's Removal Power under the Constitution* (1927); Mathews, *op. cit.*, Ch. XII; Willoughby, *op. cit.*, Ch. LXXI.

President's nominees for the Supreme Court are seldom rejected by the Senate, because such nominations are usually made with care and the Senate generally, but not always, shares the opinion of the country that the game of politics should not be played too intensively over the highest judicial appointments. The most recent exceptions to the rule of automatic confirmation of nominees for high office occurred when the Senate rejected Charles B. Warren for Attorney General (1925) and John J. Parker for the Supreme Court (1930).

THE SENATE AND OTHER APPOINTMENTS. The Senate and individual senators and representatives take a very active part in the appointment of officers outside the class of those mentioned above. The President must consult with members of Congress, more particularly the individual senators of his party, on the general run of appointments, because he cannot have first-hand knowledge of the qualifications of the thousands who seek federal office. Besides, in making an appointment, the President's task is more than to find the best qualified person for the position—he must make appointments which are politically good; and it is right here that the advice of a senator or representative is most useful. Furthermore, senators and representatives insist upon being consulted with regard to appointments, because they use this patronage to build up their local political support. Let us suppose that an important federal officer, say, a district judge, is to be appointed in a state. Various names, accompanied by many recommendations, will be presented to the President; but the President will most probably be guided in his selection of a candidate by the advice of a senator from the state, provided, of course, he belongs to the same political party as the President. When a minor federal official is to be appointed—a federal marshal, for instance—it is the custom to allow the representative from the district in which the appointment is to be made to make the selection, if the representative is of the President's party and if a senator from the state endorses the representative's choice.

"SENATORIAL COURTESY." When the President sends the Senate the name of a candidate who is recommended by a senator primarily concerned in the appointment, the Senate confirms the appointment as a matter of course. Thus, Lamar Hardy, favored for a judicial appointment in 1936 by the two senators from New York, was easily confirmed in the face of opposition led by Senators La Follette and Norris. What happens if the President does the unusual and sends in a name which has not the recommendation or endorsement of the aforesaid senator? Then, by the rule of "senatorial courtesy," which seems to have originated in Washington's administration, the Senate will stand by the senator whom the President has crossed, and will refuse to confirm the appointment.²¹ It is clear, then, that where appointments are to be made in

²¹ In 1939 the role of "senatorial courtesy" was invoked by the two Virginia senators

states which have a senator or senators who belong to the same political party as the President, the President has only a nominal appointing power, the actual power being exercised by one or two senators. Like most rules, the rule of "senatorial courtesy" is sometimes broken. Because this courtesy was denied Conkling and Platt in regard to the important appointment of a collector of the Port of New York, they resigned their seats in the Senate. They expected to find vindication in re-election by the New York legislature, but that body was not impressed by the heroics of the "senatorial suicides" and did not restore them to public life.

It seems that senatorial courtesy is often applied even in respect to appointments to be made in states which have no senators who belong to the party in power. Thus, in 1932, Senator Watson, the Republican leader in the Senate, said: "I believe that the nominee in the present case is perfectly competent; I believe he is an honest man; I believe the President was fully justified in making the appointment; but because of the fact that the Senator from North Carolina [the state in which the appointment was to be made] . . . has made the statement that this appointment is personally obnoxious and personally offensive to him, following my consistent rule and believing it to be the proper one, I cannot vote for his confirmation."²²

RECESS APPOINTMENTS. The Constitution gives the President the power to fill all vacancies that may occur while the Senate is not in session, by granting commissions which expire at the end of the next session of the Senate.²³ Such recess appointments are made final, if the Senate, when it convenes, acts affirmatively upon them. Through the use of the recess appointment, the President has sometimes kept persons in office, particularly Negroes in the South, who were opposed by the Senate. An individual is nominated for office, but rejected by the Senate. When that body adjourns, the office in question is vacant and the President may give the same nominee a recess appointment. The Senate may again withhold confirmation and the President may again make a recess appointment, but obviously there are practical limits to this game of political seesaw.

THE BURDEN OF APPOINTMENT. In spite of the fact that the President has the assistance, usually the very aggressive assistance, of senators, representatives, and other politically minded persons in selecting nominees for thousands of federal offices, his task is still a heavy one. Numerous applications and insistent recommendations consume a great deal of the new President's time, and often fail to enlighten him as to the best-qualified candidates. While the situation may be better now, a few sen-

against the appointment of Mr. Floyd Roberts as Federal District Judge in that state. Mathews and Berdahl, *op. cit.*, p. 252. See Borah resolution denouncing the practice, *ibid.*, p. 257.

²² Quoted in an editorial, *New York Times*, March 27, 1932.

²³ Art. II, sec. 2, cl. 3.

tences from Cleveland's complaint after two months in the White House in 1893 give us some conception of the burden and annoyance to which the power of appointment subjects a President: "The time . . . set apart for the reception of senators and representatives has been almost entirely spent in listening to applications for office, which have been bewildering in volume, perplexing and exhausting in their iteration, and impossible of remembrance. A due regard for public duty, which must be neglected if present conditions continue, and an observance of the limitations placed upon human endurance oblige me to decline from and after this date all personal interviews with those seeking appointments to office, except as I on my own motion may especially invite them. . . . Applicants for office will only prejudice their prospects by repeated importunity and by remaining in Washington to await results." ²⁴ Roosevelt refused to give audience to the general run of place hunters in 1933 because of the national emergency. Those who would not be put off were told to see the Postmaster General. The sordid rush for places and the strain on the President might be considerably relieved and the federal administrative services materially improved by placing the greater number of "presidential" offices under the merit system. This possibility is discussed in Chapter 20.

Removal. With regard to removal, the Constitution provides only that "all civil officers of the United States shall be removed from office on impeachment and conviction of treason, bribery, or other high crimes and misdemeanors." ²⁵ But many officers who are guilty of none of these offenses are nevertheless unfit to continue in office. An officer who is grossly incompetent in some particular, or who is affected with "streaks of miscellaneous worthlessness," is not necessarily a traitor, or a taker of bribes, or guilty of other high crimes and misdemeanors. How, then, may he be removed? Since the Constitution is silent on the subject, one might hastily answer that he is to be removed by the power which appointed him; that is, by the President and Senate, if appointed by them. That is exactly what a number of statesmen, including Hamilton, said in 1789. Other statesmen, led by Madison, argued that the President should have the power of removal, unencumbered by the advice and consent of the Senate. The Madison view was adopted, and it has increasingly prevailed with the passing of the years. A little reflection will show that there is very practical reasoning behind Madison's position. The President's responsibility for administration is not seriously impaired by the requirement that his important appointments be confirmed by the Senate; for, if the Senate rejects a capable nominee, the President may submit another,

²⁴ Quoted in C. A. Beard's *Readings in American Government and Politics* (1913), pp. 211-212.

²⁵ Art. II, sec. 4.

and no harm is done. But, if the Senate had the right to prevent him from removing an officer, then the President might be saddled from time to time with incompetent or otherwise unsatisfactory assistants.

THE REMOVAL POWER BEFORE THE COURTS. Contrary to the opinion of the man on the street, the courts do not give opinions on constitutional questions unless such questions arise in cases actually before them. In 1867, Congress passed the Tenure of Office Act, intended to deprive President Johnson of his power to remove certain officers. Johnson and some constitutional lawyers denounced the act as unconstitutional; but the Supreme Court did not have occasion to pass upon it, although it remained on the statute books (in modified form after 1869) until 1887. Not until 1926²⁶ was the highest court asked to pass upon the authority of Congress to restrict the President's power to remove executive officers. It came about in this way. In 1917 President Wilson appointed a Mr. Myers to a first-class postmastership at Portland, Oregon. Now a statute of 1876 provided that postmasters of the first three classes should be appointed and removed "by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law." Without consulting the Senate, Wilson removed Myers in 1920—less than three years after he had appointed him. If the Senate had confirmed the appointment of the person named as successor to Myers, as it commonly does, such confirmation would have amounted to senatorial consent to the removal. But the Senate rejected the President's new appointee. Myers therefore went to the Court of Claims, asking for the remainder of the salary for the four-year period, on the ground that he had been removed from office without the consent of the Senate, contrary to law. Losing in the Court of Claims, he appealed to the Supreme Court, where his case was argued in 1924, and, on account of its great importance, reargued in 1925. In its 6 to 3 decision the Court held that the Act of 1876, "in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate," was invalid.²⁷ The Court based its decision on the grounds that the First Congress (1789), in which Madison and some other members of the Philadelphia Convention sat, had decided to leave the power of removal entirely in the hands of the President; that the "decision" of the First Congress had been accepted by all the Presidents and by all the Congresses, except the Reconstruction Congress which attempted to limit Johnson's removal power; and that the President's power to remove civil officers appointed by him

²⁶ *Myers v. U.S.*, 272 U.S. 52; R. E. Cushman, *Leading Constitutional Decisions* (1940 ed.), pp. 167-169, note.

²⁷ The Tenure of Office Act of 1867 was also declared invalid in this decision, although it had been repealed in 1887.

and the Senate might be inferred from the broad principle of the separation of powers and the provision of the Constitution concerning the President's obligation to take care that the laws be faithfully executed. The Court used the logic of history and accomplished facts in its decision. As judicial decisions go, it is not considered a masterpiece; and some authorities hold that the dissenting judges' opinions were better than the majority decision. But, at any rate, the question raised seems to be settled.

The Myers case left unanswered the question of the authority of the President to remove a member of an independent commission, such as a member of the Interstate Commerce Commission. But this question came squarely before the Court in 1935. William E. Humphrey, a member of the Federal Trade Commission, was "removed" in 1933 by President Roosevelt. The statute under which members of this Commission served provided that they might be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." The President had not sought his removal on any of these grounds. The Court held that the Congress had the power to limit the President in his authority to remove members of the independent commission, since they exercise "no part of the executive power vested by the Constitution in the President."²⁸ Thus, although Congress may not limit the President in removing executive officers it may limit him in removing members of the independent commissions.

CAN THE SENATE FORCE A REMOVAL? From the foregoing discussion of the President's right to remove officers without the advice and consent of the Senate, it follows very logically that the Senate has no authority to take the initiative and force a removal. In 1924 the Senate called upon President Coolidge to remove Edwin Denby, the Secretary of the Navy, for his connection with oil leases made "under circumstances indicating fraud and corruption." Replying to the Senate and justifying his position before the country, Coolidge quoted Presidents Madison and Cleveland on the independence of the Chief Executive, and added that "the dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an executive function."²⁹

VI. COMMANDER-IN-CHIEF OF THE ARMY AND NAVY

One of the most far-reaching of the executive powers is that of commanding the armed forces of the United States. Inasmuch as this power assumes its huge proportions when the country is at war, the discussion of it is postponed for treatment in Chapter 26, which deals exclusively with "The United States at War."

²⁸ *Rathbun v. United States*, 295 U.S. 602 (1935).

²⁹ Mathews and Berdahl, *op. cit.*, pp. 325-326. As a matter of interest it might be added that the President's message, at his request, was written by Senator Borah, one of the Senators who opposed the resolution. See C. O. Johnson, *Borah of Idaho* (1936), pp. 287-288.

VII. THE PRESIDENT'S CONTROL OF FOREIGN AFFAIRS ³⁰

The conduct of our foreign relations is very largely in the hands of the President. This is true, despite the fact that he must depend to a considerable extent upon the Senate and to some extent upon the whole Congress. Of course, the President does not personally administer all the details of our official intercourse with foreign nations. Much of this is left to the Secretary of State, the President's right-hand man in all diplomatic matters, and to subordinate officers in the diplomatic service. But the President is the responsible official, and he often takes a direct part in international affairs. The extent to which the President actively participates in diplomatic negotiations depends upon the Chief Executive's interest. Wilson represents one extreme, taking personal control of all international matters of any consequence. He was in reality his own Secretary of State. Perhaps the other extreme is represented by Harding, who relied chiefly upon his Secretary of State, the very capable and indefatigable Mr. Hughes. In any case, directly or indirectly, the President controls the foreign service personnel, serves as our sole official international spokesman, recognizes new governments and states, makes treaties (subject to the approval of the Senate), and, consequently, has the power to determine very largely our foreign policy. In this section we shall consider the President's part in these matters, reserving the organization and activities of the State Department and the foreign service for the chapter on "National Administration."

Control of foreign service personnel. The Constitution authorizes the President, with the consent of a majority of the senators present, to appoint ambassadors, other public ministers, and consuls. Those who hold the lower and intermediate positions in these services are now appointed subject to civil service rules, but the President has a free hand in making appointments to the higher positions. He may, of course, remove diplomatic and consular officers at any time. Not only does the President have a wide controlling authority over the personnel of our foreign service; but, through his constitutional authority to receive diplomats and other public ministers from foreign countries, he may, in a negative sense at least, exert some control over them. He need not receive persons against whom he has objections, nor is he bound to receive anyone from governments with which he does not wish to establish friendly relations. Having received a diplomat, he may for various reasons request the foreign government to recall him. He may even dismiss a foreign representative, although he is not likely to do so except in cases of extreme emergency.

³⁰ C. A. and Wm. Beard, *op. cit.*, Ch. XXII; Corwin, *op. cit.*, Ch. VI, and his *The President's Control of Foreign Relations* (1917); Laski, *op. cit.*, Ch. IV; J. M. Mathews, *The Conduct of American Foreign Relations* (1922); Q. Wright, *The Control of American Foreign Relations* (1922).

Sole official spokesman on foreign affairs. The President is the only official who may communicate with a foreign government. Private negotiations with foreign governments would clearly be out of order in any case; but, following the attempt of a Quaker to make peace with France in 1799, Congress stipulated a fine and imprisonment for such interference. Congress itself may not address a foreign power. Even a resolution in response to congratulations extended by a prince is held to violate the Constitution and practice of the United States respecting intercourse with foreign powers. When the House of Representatives by resolution protested against the Maximilian government in Mexico, Secretary of State Seward advised the French government that the question was purely executive, and that the decision rested, not with the House, or even with Congress, but with the President of the United States. If the President is the only official spokesman for the United States, it follows that to him alone may be addressed communications from foreign powers. As early as 1793, Jefferson, then Secretary of State, told Citizen G  net that the President was the only authority with whom foreign nations could communicate. When German Ambassador Bernstorff warned the American people, through the press, against sailing on the *Lusitania*, Secretary of State Lansing referred to the proceeding as a "surprising irregularity." Bernstorff should have advised the President of the plans of the German government and left the matter of warning American citizens to the President's discretion. These illustrations are sufficient to show that only the President or his representatives may officially receive or send foreign communications.³¹

Routine communications with foreign governments. Let us consider for a moment the ordinary communications with foreign governments. Working through the Secretary of State, the President takes care of the innumerable incidents touching the safety and well-being of Americans and their possessions abroad. If an American alleges that his property has been confiscated by the government of State A, or that he has suffered violence at the hands of brigands in State B, or that he is unjustly imprisoned in a concentration camp in State C on the charge of having participated in a revolution, or that a treaty granting trade privileges in State D is unhonored by the government of that country, the machinery of the executive department of our government is put in motion on his behalf. The Executive must, of course, receive similar complaints and protests from foreign governments against the acts of our government and people. These and many other pin pricks in the rather sensitive flesh of international relations must be constantly prevented from developing into open sores. A successful foreign policy and the peace of the nation depend as much upon a careful and sane attention to the routine of foreign affairs as they do upon steering the ship of state through an occasional

³¹ Wright, *op. cit.*, Ch. III.

diplomatic crisis. Indeed, crises are not likely to arise if the smaller and ever-recurring incidents and minor misunderstandings are settled in a friendly and conciliatory spirit.

The power of recognition. The power of recognition rests entirely in the hands of the President. The Constitution makes no provision for it, but by international practice and as an incident to the power to send (subject, of course, to confirmation of appointments by the Senate) and receive diplomats, it has long been considered a purely executive function. Suppose a revolt in a foreign country leads to the overthrow of the government and the revolutionists get control. Whether we shall recognize the new government, or continue to recognize the old, or eventually recognize no government at all, is for the President to decide; although advice sought and unsought will come to him, both from official and unofficial quarters.

The question of recognizing new governments has been a very vital one in our relations with the Latin-American countries and with Soviet Russia. Recognition, either long delayed or premature, may seriously affect new governments and injure the standing of the United States with them. Recent examples of recognition are furnished by the President's recognition of the Vichy Government of France (1940) and of a number of "Governments in Exile" (1940-1942)—governments which fled to Britain or America as the Axis powers were occupying their home lands.

The President may also recognize new states. This is an affair of much more consequence than recognizing a new government; for new states are carved from the territory of old states, and recognition of the newcomer is, therefore, a recognition of the parent state's loss of territory. Thus President Theodore Roosevelt grievously offended Colombia when he recognized Panama as a new state after the inhabitants of the Isthmus had staged a brief revolt.³²

Treaty-making. The Constitution authorizes the President to make treaties, but places rather strict limitations upon his power in this respect, requiring that treaties shall be approved by two thirds of the senators present.³³ Indeed, some members of the Constitutional Convention wished to limit the treaty-making power of the President even further, by requiring the consent of the House of Representatives in addition to that of the Senate, or by requiring a two-thirds majority of the entire Senate. Approval by a majority of the Senate and the House is often advocated today, because consent of a simple majority in both Houses would be easier to obtain than the two-thirds majority in the Senate and because, in most cases, the House must co-operate in putting a treaty in force.³⁴

³² The President may also recognize, by a proclamation of neutrality, that war exists between nations. In like manner he may recognize the "insurgency" or "belligerency" of a revolting faction within a nation.

³³ Art. II, sec. 2, cl. 2.

³⁴ See *New York Times*, Sept. 25, 1932, for Newton D. Baker's proposal.

STAGES IN TREATY-MAKING: 1. *Negotiation*. The process of treaty-making may conveniently be divided into a number of separate stages, the first of which is negotiation. Although negotiations are sometimes suggested by resolution of Congress, the initiative is commonly taken by the President. In any case he appoints the negotiators, outlines the provisions they are to strive to incorporate in the treaty, gives them additional instructions from time to time while the negotiations are in progress, and passes upon their finished product. In these actions, the President is legally free from senatorial interference; but considerations of practical politics may lead him to consult with the Senate, or at least with members of the Foreign Relations Committee, during the course of the negotiations, or even to appoint members of the Senate on the commission of negotiation.³⁵

2. *Senatorial consideration*. When the treaty has been negotiated, the President transmits it to the Senate for its consent to ratification. At this stage, the Senate may consent to the treaty as drafted, refuse its consent entirely, or consent on condition that certain specified changes (amendments or reservations) be made in the document. In the latter case, the President must then reopen negotiations with the foreign government with a view to securing its consent to the proposed changes, or he may allow the treaty to be dropped. After the treaty has been sent to the Senate for approval, the President may at any time withdraw it from further consideration, after which he may resubmit it in its original form or with such changes as the foreign government has agreed to, or which he himself suggests, or he may drop it entirely.³⁶

3. *Ratification and exchange of ratifications*. The stages of treaty-making after senatorial approval of the document has been secured are in the hands of the President alone. He informs the foreign nation (or nations) of the American acceptance, and proceeds to make arrangements for the exchange of ratifications, which makes the treaty internationally binding. After the exchange of ratifications, the President proclaims the treaty in force as a part of the law of the land.

AGREEMENT-MAKING POWER: 1. *On the President's own authority*. The President possesses the power to make agreements (which are rather difficult to distinguish from treaties) with foreign nations without being required to submit them to the Senate. Some agreements are made by the President simply on his own authority. Probably the most outstanding example of this type of agreement is that made in 1905 by President Theodore Roosevelt with Santo Domingo, providing for the administration of customhouses in that country. Obviously, there are many objections to the making of executive agreements without clear authority for so doing,

³⁵ Wright, *op. cit.*, pp. 248-251.

³⁶ *Ibid.*, pp. 254-255; S. B. Crandall, *Treaties, Their Making and Enforcement* (1916 ed.), pp. 81-97.

one of the objections being that a President might render himself liable to impeachment.

2. *On the authority of a treaty or an act of Congress.* Many executive agreements are made under authorization of treaties to which the United States is a party, or under the authority of an act of Congress. These agreements usually relate to such subjects as boundary settlements, extradition of fugitives from justice, arbitration, trade-marks, patents, copyrights, postal service, and commercial privileges.³⁷ The reciprocal tariff agreements of recent years are made by the President under the authority of an act of Congress.

Shaping foreign policy. From the aggregate of diplomatic powers discussed, it is clear that the President is the principal agent in the government for determining foreign policy. To be sure, the Senate may block his efforts by withholding consent to a treaty, and Congress may embarrass or even tie the hands of the President by enacting legislation which conflicts with his plans or by failing to enact laws necessary for perfecting his plans. The Senate's adverse action with respect to Wilson's League of Nations proposal is well known. The act of Congress (1924) which abrogated the "Gentlemen's Agreement" (the understanding by which Japanese immigration had been regulated for nearly twenty years) over the protest of President Coolidge and Secretary Hughes, and which caused serious friction between the two countries, is a familiar example of what Congress may do. These and similar illustrations which might be offered of the thwarting of the President's policy prove only that he does not always have clear sailing, but he is still the guiding force in determining our relations with the foreign powers.

The proclamation of neutrality issued by Washington in 1793, at the time the nations of Europe were entering upon a general war, not only laid down a course which this country has since followed, but also had great influence in fixing the standard which other nations have followed. In his Farewell Address, Washington announced the policy of isolation. Admitting the wisdom of this policy for a young republic, and without considering the equally wise variations from it in the days of national adolescence and manhood, we simply add that it has had and still has, both as a policy and a term, a very pronounced influence in American foreign relations. The Monroe Doctrine, announced by the President in 1823 and interpreted by each succeeding President according to his own notions of what it should be, has had an incalculable influence both in our official actions and in the minds of the people sanctioning those actions. The conciliatory policy of Lincoln and Seward brought us safely through serious international difficulties during the Civil War. Wilson's policy kept us out of the World War for a time and determined almost

³⁷ On executive agreements, see Wright, *op. cit.*, pp. 237 ff.

the exact date of our entrance into it. The brief period of isolation, due largely to the Senate's opposition to Wilson's foreign policy of international co-operation at the end of the war, gave way to a new era of executive leadership which might be characterized as one of cautious co-operation with the foreign powers. We took an important part in the negotiations which resulted in the Pact of Paris (1928) renouncing war as an instrument of national policy, and we assumed leadership in interpreting its obligations. Then came the dictators, singly and in combinations, and the new series of crises supplied numerous illustrations of the tremendous power of the President in guiding our foreign relations. In December, 1937, the Japanese, prosecuting their undeclared war on China, bombed a United States gunboat, the *Panay*, which was convoying Standard Oil tankers on the Yangtze. Lesser incidents in Latin American countries had called for the dispatching of ships and the landing of marines, but President Roosevelt and Secretary of State Hull, perhaps strongly influenced by the marked peace sentiment of the American people at that time, were able to bring the *Panay* incident to a close without any great risk of war with Japan. At the same time, it seems that the President was able to use this incident as a means of furthering his naval expansion program.

The Neutrality Act of 1937 provided that whenever the President should find a state of war existing between foreign nations, he should issue a proclamation prohibiting the exportation of arms, ammunition, or implements of war from the United States to these nations. The President was never enthusiastic about this particular piece of legislation, for it was his belief that it unduly interfered with his duty and power to direct our foreign policy. When Japan embarked upon her undeclared war on China, the President failed to "find" that it was a war, because he entertained the belief, shared by many others, that the arms embargo would operate to the disadvantage of China. On the other hand, although the neutrality legislation on the books at the time the Spanish Civil War broke out (1936) did not apply to civil wars, the President at first attempted without legislation to enforce an embargo and later used strong pressure in securing from Congress a resolution prohibiting the shipments of arms to Spain.

Fearing the growing power of the dictators, whose intervention in Spain on behalf of Franco he had unwittingly aided by his embargo-on-arms policy, President Roosevelt unsuccessfully attempted in the summer of 1939 to have Congress repeal the embargo legislation. In the fall, with the war between Germany and the Allies in progress, Congress yielded to his entreaties and lifted the embargo on the shipment of arms, although in the same act it included a provision, recommended by the President, prohibiting American ships from entering combat areas. It is a matter of common knowledge that the purpose of this piece of legislation was to aid the

Allies, who could transport war materials from America, against Germany, who could not.

A call for all of the democracies to line up against the dictators, a declaration that we include Canada in the list of countries which come within the protecting folds of the Monroe Doctrine, the undertaking of negotiations to form an economic union to prevent totalitarian economic penetration in the Americas, an announcement that we will not recognize conquests in violation of treaties, or conquests without the curse of treaty violation, a dramatic statement that one nation has stabbed another in the back, and the decision to give the Allies all possible aid short of military co-operation were all matters laden with fateful possibilities for the future of the Republic, and very largely in the hands of the President. It is a fact worthy of note, however, that no President can carry us very far in a direction we do not want to go. He can contribute immensely to the forming of public opinion, but he is not master of it.³⁸

Despite occasional setbacks by other organs of the government, the President's policy in recognizing foreign governments, in co-operating with other nations in settling disturbances in various parts of the world, in pressing the claims of Americans at foreign courts, in maintaining our neutral rights against the encroachments of warring nations, in interpreting our obligations under treaties, tends to bind the other branches of the government as well as his successor in the White House to his course of action. Although an ill-considered act or resolution of Congress, or an irresponsible yellow press, may seriously interrupt friendly relations with foreign powers, a wise President can often repair the damage. Whether other nations respect us or hold us in contempt, trust us or suspect us, seek our friendship or arm against us, depends largely upon the President's foreign policy.

VIII. THE PARDONING POWER³⁹

The scope of the pardoning power. The Constitution states that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The courts have held that Congress has no power to limit the President in his use of this "benign prerogative of mercy." Until a few years ago it was erroneously supposed that the President had no authority to grant pardons in cases of criminal contempt. The courts punish for contempt in order

³⁸ Current literature is full of the subject of American foreign policy, particularly as it is affected by the European crisis. One of the best sources is *Foreign Affairs*, an American quarterly review. Two books are of special interest. Charles A. Beard in his *A Foreign Policy for America* (1940) upholds the isolationist view, and Raymond Leslie Buell in his *Isolated America* (1940) emphasizes the responsibility of the United States in the affairs of the world.

³⁹ Corwin, *The President*, pp. 136-148; Matthews, *op. cit.*, pp. 175-179; Willoughby, *op. cit.*, pp. 623-624, 690.

to protect themselves and further their usefulness, and it was thought that the exercise of executive clemency for contemnors would seriously undermine the position of judicial tribunals. However, when Philip Grossman, of Chicago, continued to sell liquor in violation of a court injunction and was sentenced to jail for contempt, the President pardoned him, and was upheld in so doing by the Supreme Court.⁴⁰ Although Congress has no authority to limit the President's power to grant pardons, that does not mean that the power is to be exercised exclusively by the President. Congress itself may exercise it by passing acts of general amnesty. Thus, an act granting immunity from prosecution to all witnesses testifying before the Interstate Commerce Commission was held to be valid.⁴¹ Furthermore, the courts have held that the President's pardoning power is not so exclusive as to prevent Congress from giving other officers, such as the Secretary of the Treasury, the authority to remit certain forfeitures and penalties.⁴²

ANALYSIS OF THE POWER. "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."⁴³ But a pardon does not restore offices forfeited, or property or interests vested in others in consequence of a conviction. A pardon may be granted before, during, or after a trial; that is, at any time after the offense is committed, but it usually comes after a conviction. The pardon may be a remission of the whole or a part of the penalty. Thus, an offender under a death sentence may be fully pardoned, or his sentence may be commuted to a prison term. The President may also grant a reprieve; that is, a suspension of the execution of a sentence. Finally, we must note that the President may grant general pardons or amnesties to a class of offenders; for instance, to a group guilty of insurrection.

HOW THE POWER IS EXERCISED. Probably the average individual has a picture of a wife, soon to be a widow, weeping with her children before the President and begging for the life of the husband and father until the President signs a pardon. This, of course, may happen, but the President is unworthy of his high office, if his pardons are determined by tears and sobs. The regular procedure is somewhat less dramatic. An application for pardon and papers bearing on the case are examined by officers of the Department of Justice. If the convicted individual has had a fair trial, if no new evidence tending to exculpate him is produced, and if the sentence is just, the President's legal advisers will in all probabil-

⁴⁰ *Ex Parte Grossman*, 267 U.S. 76 (1925).

⁴¹ *Brown v. Walker*, 161 U.S. 591 (1896).

⁴² *The Laura*, 114 U.S. 411 (1885).

⁴³ *Ex Parte Garland*, 4 Wall, 333 (1866).

ity recommend that the sentence be allowed to stand. The President will take this advice in most cases, although he is entirely free to use his own judgment.

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The President as Chief Legislator



In the last chapter our attention was directed to some general features of the presidential office and in particular to the President's executive powers. Important as we found those powers to be, they are probably of little more importance than his legislative powers. Although the Constitution stipulates that all legislative powers shall be vested in Congress, it nevertheless gives the President a share in legislation. Just what this share amounts to and how it has been enlarged through usage is the subject of this chapter.

A general view of the President's legislative powers. Although the framers of the Constitution accepted the theory of the separation of powers, they realized that an absolute division of authority between the two political branches of the government (executive and legislative) would be unworkable or highly unsatisfactory in practice. Consequently, they gave Congress, especially the Senate, a share in executive affairs, and they conferred upon the President some very definite legislative powers. Thus, the Constitution authorizes the President to call Congress into special session; to adjourn it when the two Houses cannot agree upon a time for adjournment; to give it information concerning the state of the Union; to recommend measures for its consideration; and to veto its bills, orders, resolutions, and votes. But the powers enumerated do not tell the whole story of the President's authority in legislation. His power and influence over Congress have been almost steadily increased through the prestige of his office, his position as leader of his party and the nation, and his use of executive powers for legislative purposes. The President whose activity in legislative affairs does not go far beyond the clauses of the Constitution is severely criticized as being weak in the qualities of leadership.

I. PRESIDENTIAL AUTHORITY OVER SESSIONS OF CONGRESS

Calling special sessions. The Constitution requires Congress to assemble at least once a year—on January 3,¹ unless Congress by law fixes a different date. The Constitution provides further that the President may, on extraordinary occasions, convene both Houses of Congress, or

¹ The Twentieth Amendment, adopted in 1933, fixes January 3 as the date. The old date of assembly was the first Monday in December.

either of them. The extra sessions are called entirely upon the President's responsibility, although he may be greatly influenced in his decision by the advice of leading members of Congress or even by suggestions and importunities from private sources. War, or its imminence, will quite likely lead the President to convene Congress in extraordinary session, as Wilson did in 1917. A new administration, in its eagerness to get started with its program or in fulfillment of a pre-election pledge, usually calls a special session. An extra session was thus called by Taft for tariff revision, by Wilson for tariff reform and other phases of his "new freedom" program, by Harding for the enactment of a protective tariff and "a return to normalcy," by Hoover for farm relief and "limited changes in the tariff," and by Franklin Roosevelt for legislative authorization to make the "New Deal." The President has often exercised his authority to call one House into special session without the other, by convening the Senate for the special purposes of securing that body's consent to the ratification of treaties and its confirmation of appointments to office.²

Limited authority over adjournment. The President has constitutional authorization to adjourn Congress in case the two Houses cannot agree with respect to the time of adjournment. To date, as the two chambers of Congress have always managed to reach an agreement, the President has never exercised this power. The Chief Executive has no more authority in adjourning a special session than he has in adjourning a regular session. It may happen, therefore, that an extra session which he has called to give farm relief, for example, may get completely out of hand and spend several months in political wrangling on less important affairs.

II. PRESIDENTIAL MESSAGES TO CONGRESS

Annual messages. In the language of the Constitution, the President "shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."³ This double requirement to report on the state of affairs and to recommend legislation, the Presidents invariably meet in their formal annual messages to Congress at the time it convenes. Such messages may contain some items for political purposes, but they usually deal in a rather direct way with the problems waiting to be solved. They are taken seriously by Congress and perhaps more so by the public. Some of them have made history. Who has not heard of the Monroe Doctrine—first given formal expression in two widely

² Congress was not in session in June, 1931, when President Hoover proposed the moratorium on war debts. Instead of calling a special session, the President secured, within a few hours, unofficial approval of his plan by telephoning and telegraphing members of Congress.

³ Art. II, sec. 3, cl. 1.

separated paragraphs of President Monroe's message to Congress in December, 1823! Hardly less famed is Cleveland's message of December 17, 1895, in which he vigorously reaffirmed and expanded the Monroe Doctrine in relation to the Venezuelan-British boundary dispute. A typical annual message is found in the twelve-thousand-word communication of President Hoover in December, 1929. He dealt with such questions as our adherence to the Permanent Court of International Justice; national defense; tax reduction; the flexible tariff; waterways and flood control; the postal service; railways; the merchant marine; banking; electrical power regulation; radio; conservation; federal prisons; immigration; the reorganization of the federal administration; Prohibition, and law enforcement. On some matters he made specific recommendations; but more commonly his counsel was general in tone, leaving the problem to be studied and solved by Congress. The budget message, an annual message on the most important subject of national revenues and expenditures, is discussed in the chapter on "Government Finance."

Other messages to Congress. The President's messages to Congress are by no means limited to the above-mentioned annual communications. When he calls a special session of Congress, he very naturally states the purposes for which he called it and proposes legislation—usually much more definitely than in his annual message. It was in an oral message to Congress in special session that President Wilson asked for a declaration of war with Germany. The President may send a message to Congress on any subject at any time. He may ask for money with which to defray the expenses of a survey commission, or urge more speed on a tariff bill, or suggest that "the state of the Union" demands that Congress leave off investigating and discussing administrative scandals and turn to constructive legislation. President Hoover sent no less than 63 messages to Congress during its session from December 7, 1931, to June 16, 1932, suggesting, advising, and urging that action be taken on various subjects.⁴ President Franklin D. Roosevelt's practice has been to speak in general terms in his annual message and to deal with numerous specific problems in separate messages.

How messages are delivered. Washington and John Adams delivered their important messages orally, the two Houses meeting in joint session to receive them. The method of our first two Presidents was not followed by their successors, who for well over a hundred years sent their messages to Congress, where they were droned out by clerks. In 1913 Wilson returned to the early practice. Harding followed Wilson's example; but Coolidge, after using it twice, abandoned it for the time-honored written message. Hoover's messages were in writing also, save for one personal appearance before the Senate to urge that body to balance the budget.

⁴ Pendleton Herring, "First Session of the Seventy-Second Congress," *Am. Pol. Sci. Rev.* (1932), XXVI, 855.

Perhaps the President does not by the oral message directly increase his influence over Congress; but there is little doubt that he does secure greater public interest in his program, and this public interest may be crystallized into pressure upon Congress to follow the President's lead. Few would deny that Wilson's rather dramatic appearances before Congress had much greater public effect, both in this country and abroad, than written messages would have produced. President Franklin D. Roosevelt has used the oral message to penetrate every cell of reason and to play upon every string of emotion. He speaks to Congress, making no pretense of not knowing that the American people are listening over the radio; and he speaks to the whole world, throwing in a special word for the enemies of the United States. Assured of popular support and a substantial congressional majority, his tone may be mandatory; uncertain of such support, he is likely to be conciliatory and emphasize partnership; he may triumphantly report achievements of his Administration or of the progress of the United States in war; or, with his back near the wall, he may be aggressive, even defiant. The manner varies, but the master political mind seldom experiences a "black-out," nor does the perfect radio voice falter, nor the experienced hand tremble.

A factor of significance equal to that of the manner of delivery is the timing of a message. As observed above, the President frequently sends Congress special messages on matters of importance. In 1933 when the Senate was debating the President's economy bill and while its fate was in doubt, the President sent a brief message recommending that the Volstead Act be modified to permit the sale of beer. "The public demand for economy was excelled only by its thirst for beer," comments Professor Pendleton Herring.⁵ Pressure upon Congress for both measures became intense. Both Houses, torn by dissension over the economy measure, at once enacted it and unitedly and joyously voted for beer. "Now, boys," the President had said in effect, "as soon as you get that economy bill out of the way, we can have some beer."

Effect of messages. The only obligation Congress is under with regard to a message from the President is to receive it. If, however, the majority in each House is of the same party as the President, his message will probably receive careful consideration and a number of his recommendations will be followed. An aggressive President who is a master of the art of politics can usually find the means for bringing his congressional majorities to enact the major features of his program into law. As intimated a moment ago, messages are often delivered for the public as well as for Congress. If such messages express the public sentiment on old questions still awaiting settlement or reveal new problems urgently demanding solution, the force of public opinion may be so strong as to stir a reluctant Congress to action. President Wilson used his message to Congress

⁵ Herring, *Presidential Leadership*, p. 62.

very effectively in getting public support for his progressive program in domestic affairs, and later in leading the country into war with the Central Powers. Indeed, his war messages were delivered not only to the American Congress and people but to the whole world, giving the President a position of leadership in world problems which few, if any, had ever achieved. In 1933 the national emergency and popular approval of the President's leadership led Congress to adopt practically every item of Roosevelt's reconstruction program, and his messages to Congress during the Second World War may take their place in effectiveness along with those of Wilson.

III. THE PRESIDENTIAL VETO POWER ⁶

Extent of the veto power. Every bill, order, resolution, or vote passed by the Senate and the House of Representatives must be presented to the President. If he approves the act, he signs it, and it becomes a law; but if he objects to it, he may exercise his veto power, and the act does not then become a law unless Congress passes it over his veto by a two-thirds majority. There are three matters upon which the President cannot use the veto. First, the question of the adjournment of Congress is expressly excepted by the language of the Constitution. Second, a proposed amendment to the Constitution, which requires a two-thirds vote of each House in the first instance, is not subject to the veto. Third, Congress early devised a special type of measure, called the concurrent resolution, which is not submitted to the President. In 1897 the Senate Committee on the Judiciary conceded that the language of the Constitution gave the President a veto on such resolutions; but the Committee placed what it considered a more practical construction on the veto clause, and arrived at the conclusion that "matters peculiarly within the province of Congress alone" and which "never embraced legislative decisions proper" should, in conformity to the long-established practice, continue to be exempt from executive action.⁷ Thus, by concurrent resolution, the two Houses authorize joint committees, the publication of documents, payment for the same, and other expenses incident to the work of Congress for which funds have already been appropriated by law. The concurrent resolution should be distinguished from the joint resolution, which is in a real sense a legislative measure and as such is submitted to the President for his approval or rejection. The exceptions noted above do not materially impair the veto power. The President may use it in connection with all measures which are definitely legislative in character. Since

⁶ C. A. and Wm. Beard, *The American Leviathan* (1930), pp. 284-287; J. M. Mathews, *The American Constitutional System* (1940 ed.), Ch. XI; G. C. Robinson, "The Veto Record of Franklin D. Roosevelt," *Am. Pol. Sci. Rev.*, XXXVI, 75 (Feb., 1942); K. A. Towle, "The Presidential Veto since 1889," *Am. Pol. Sci. Rev.*, XXXI, 51 (Feb., 1937).

⁷ Mathews, *op. cit.*, pp. 148-149.

a two-thirds vote is necessary to override a veto, the power is a very strong defensive weapon in the hands of the President, giving him the strength of one sixth the membership of Congress.

Messaged veto. When the President receives a bill from Congress, he has ten days, not counting Sundays, in which to consider it. He may, of course, seek advice on the bill from any source; but he is most likely to consult the Attorney General or the head of the department primarily affected by the measure. Usually he decides to approve the bill, and affixes his signature. If he follows the very unusual procedure of neither signing nor vetoing the bill during the ten days allowed, Congress continuing in session, the bill becomes a law without his signature. When the President exercises the power of veto, he must return the bill, together with the reasons for his veto, to the House in which the bill originated. That body then proceeds to reconsider the bill, and, if two thirds of the members present approve it, it is sent to the other House, where a two-thirds vote will make it a law despite the executive veto. Obviously, if either House fails to muster the two-thirds majority, the bill fails to become a law.

The pocket veto. Suppose Congress adjourns within less than ten days after the President has received a bill and before he has acted upon it. Non-action on the part of the President after Congress has adjourned kills the bill. This method of allowing bills to die quietly after Congress has adjourned has been used well over 700 times. It is appropriately called the "pocket veto." It should be observed that the pocket veto is an absolute veto, since Congress, being adjourned, has no opportunity to reconsider a bill so vetoed. A President sometimes places on record his reasons for a pocket veto, but his explanation is not a veto message as in the case of bills returned before the end of a session.

Approval of bills after Congress adjourns. During the ten days preceding adjournment, Congress usually enacts a number of bills of which the President approves. Formerly, it was thought that all such bills should be signed before the adjournment, and Presidents, sometimes reproaching Congress for its volume of legislation near the end of its session, hurriedly signed scores of them as the session drew to a close. But Wilson, accepting the advice of his Attorney General that the adjournment of Congress did not deprive him of his constitutional right to defer action on any bill for ten days, signed some bills after the close of the session. Later Presidents have followed Wilson's example; and the Supreme Court, in 1932,⁸ declared constitutional this new practice which makes it possible for the Chief Executive to give more deliberate attention to the dozens of bills which are presented to him during the hectic days immediately preceding adjournment. On the day of adjournment of the last session of

the Seventy-first Congress, President Hoover signed twenty-six measures and reserved some four hundred for further study.

Use of the veto. The early Presidents used the veto sparingly. John Adams, Jefferson, and John Quincy Adams did not use it at all. Jefferson probably expressed the opinion of his contemporaries when he said that the President should approve a bill unless it was rather clearly unauthorized by the Constitution. But Jackson, in a characteristic manner, refused to be limited by such an interpretation. Considering that only nine bills had been vetoed before 1829, his "twelve vetoes descended upon Congress like the blows of an iron flail."⁹ He even went so far as to veto a bill to recharter the national bank on the grounds of unconstitutionality, although the Supreme Court had declared the original chartering act to be constitutional. Said the vigorous Executive, in part: "The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the Constitution. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."¹⁰ Although later Presidents did not go to Jackson's extreme in boldly asserting that the Supreme Court had erred in interpreting the Constitution, they have followed his practice in freely exercising the veto power, particularly since the Civil War. They not only veto acts which in their opinion are unconstitutional; but they veto those they regard as extravagant, untimely, inconsistent with our treaty obligations, or otherwise inexpedient. Cleveland and Franklin D. Roosevelt share the honors as veto Presidents, their combined disapprovals representing two thirds of all measures vetoed. Before January 1, 1941, Roosevelt had submitted messaged vetoes of 262 bills and had pocket vetoed 243 others, a total of 505. Cleveland concentrated his attention on pension, military, and naval relief measures. Roosevelt's vetoes cover practically the entire range of congressional activity, having been employed on measures designed for agricultural relief, soldiers' bonus, flood control, the protection of fisheries, national defense, Memorial Day observance, the regulation of approaches to cemeteries, the installation of parking meters, and a host of other matters great and small.¹¹

Overriding the veto. Public opinion is usually on the side of the President in his exercise of the veto, and Congress seldom finds the two-thirds majority necessary to override it. (It should be clear that the messaged veto is the only type of veto which ever reaches Congress.) It is true that President Johnson, a Union Democrat warring with a Congress over-

⁹ Quoted in Brooks, *Political Parties and Electoral Problems* (1923 ed.), p. 55.

¹⁰ Quoted in W. W. Willoughby, *The Constitutional Law of the United States* (1910 ed.), I, 1306-1307.

¹¹ G. C. Robinson, "The Veto Record of Franklin D. Roosevelt," *Am. Pol. Sci. Rev.*, XXXVI, 75 (February, 1942).

whelmingly Republican, saw fifteen bills passed over his veto, but other Presidents have had no such experience. Not one time in ten has Congress been able to nullify the Executive veto.

Vetoes are seldom overridden for the reason that nearly always more than one third of the members of one House or the other will agree with the President, and thus defeat a bill upon reconsideration. Taking advantage of this fact, large majorities in Congress not infrequently pass unwise bills for the purpose of pleasing their constituencies, many congressmen who vote for such bills hoping and expecting all the while that the President will show a more courageous spirit than they and kill the measures with his veto. When a Presidential veto of a measure of this nature has seemed to be in danger of being overridden by Congress, some congressmen who supported the measure originally have on occasion changed sides and voted to support the Executive veto.

The threat of veto. The President may exercise a sort of veto by informing a committee of either House, or the whole Congress, of his intention to veto a pending bill. He may state that he objects to certain features of it which must be modified before he can approve it, or he may say that he is opposed to the whole purpose of the bill and will veto it in any event. When the bill authorizing an increase in veterans' loans on their bonus certificates was before the Senate Finance Committee in February, 1931, President Hoover wrote a letter to Chairman Smoot, giving his objections to the bill and warning Congress that the bill would delay the return of prosperity and place additional financial burdens upon the country. Later, when it was feared that the President would kill the bill with a pocket veto, Mr. Hoover assured Senator Reed in a telephonic conversation that he would exercise a direct veto, thus giving Congress an opportunity to pass the bill over his veto before adjournment.¹² The assurance that the veto would be exercised did not deter Congress in this particular instance, for the American Legion and other organizations exerted pressure which Congress could not resist. President Roosevelt was more successful when, in 1939, he wrote Senator Harrison, Chairman of the Senate Committee on Finance, that he would veto a pending bill if certain provisions were incorporated in it which he regarded as certain to impair reciprocal trade agreements between the United States and several other countries.¹³

The question of the item veto. The President seems to have no authority to veto separate items of a bill. He must accept or reject the measure in its entirety. The item veto in the hands of the President would enable him to restrain congressional extravagance in the matter of appropriations. Under our present system, however much the President may preach

¹² *Time*, March 2, 1931, p. 14.

¹³ Mathews and Berdahl, *op. cit.*, pp. 286-287.

economy and endeavor to keep expenditures down, he usually feels forced to accept an appropriation bill, even if unjustifiable items are included, because his disapproval of the bill might necessitate an extra session of Congress or lead to friction with that body, or seriously interfere with the indispensable administrative services.

More than three fourths of the states have empowered the governor to veto separate items of appropriation bills, and in a number of states he may reduce items. Although there is no doubt that some governors have abused these powers, it is generally conceded that this additional executive discretion has improved the system of appropriations in the states, and there are many scholars and public men who propose that the President's veto power also be extended to separate items of appropriation bills.

RIDERS. Congress has sometimes tacked to appropriation bills measures relating to entirely different subjects. Frequently a President would veto such measures if they appeared in separate bills; but, since he can ill afford to veto appropriation bills to which they are attached, they "ride" to executive approval on the backs of the finance bills. Thus, a rider on an Army appropriation bill virtually deprived President Johnson of his power as Commander-in-Chief of the Army. President Hayes earnestly contended against the use of the rider, and the House of Representatives practically conceded his point,¹⁴ although, on occasion, Congress still arranges a "hitch-hike" for a measure. In August, 1937, Senator Tydings managed to have his Miller-Tydings Bill incorporated into a measure imposing additional taxes in the District of Columbia. This rider was really an amendment to the Sherman Anti-Trust Act of 1890, and it weakened that act in that it permitted manufacturers of branded and trade-marked articles destined for interstate commerce to fix retail prices in about forty states which sanctioned this procedure in intrastate business. Several months earlier the President's opposition had blocked the Miller-Tydings Bill, but now, finding it attached to a revenue measure, he had no choice but to approve it or veto the revenue law along with it. "This is the first instance during my term of office," he complained, "that this vicious practice of attaching unrelated riders to tax or appropriation bills has occurred. . . . I have decided to sign the bill in the hope that it will not be as harmful as most people predict."¹⁵ In the letter to Senator Harrison, referred to above, the President was objecting to proposed rider tariff legislation in a bill which was supposed to deal only with excise taxes. Prompted by the desire to outlaw the rider system and to bring individual items of appropriations bills under his scrutiny, the President, in his 1938 budget message to Congress, recommended legislation or a constitutional amendment, whichever course Congress might deem to be the correct one,

¹⁴ J. Bryce, *The American Commonwealth* (1913 ed.), I, 214-215.

¹⁵ *Time*, August 30, 1937, p. 11.

to authorize the item, or selective, veto. His suggestion provoked some interesting and nonpartisan discussion, but it was not pressed in Congress or out.¹⁶

IV. THE PRESIDENT'S EXTRA-CONSTITUTIONAL MEANS OF INFLUENCING LEGISLATION ¹⁷

Up to this point attention has been confined to those legislative powers which the Constitution expressly grants to the President. But the legislative power of the President rests more upon the influence he exerts through his personality, his political astuteness, his skill in working with groups and individuals, his resourcefulness, his ability to gage the public attitude, and a variety of other factors than it does upon the clauses of the Constitution. That document distinctly does not make the President the chief legislator. Indeed, it may be inferred from the Constitution that the Framers expected the President to go along quietly with Congress, giving it a few suggestions now and then, but making his chief care the mandate laid upon him by the Constitution "that the laws be faithfully executed." It soon came about, however, that Congress was divided by political parties and by sectional interests stronger than those parties, interests which could wreck parties and create new parties. It became more and more difficult for Congress to legislate in the national interest and it became necessary for the President to supply leadership on matters of national policy. Although presidential leadership goes back to Jefferson and Jackson, Theodore Roosevelt introduced the type of Executive domination with which the country has become familiar. To-day the people, and to a considerable extent, Congress itself look to the President for legislative leadership. If he does not supply it, he is written down as a failure, as indeed he is. Therefore, in directing legislation the President uses not only his constitutional powers, but he employs also a number of means not mentioned in the Constitution—means which we may designate as extra-constitutional. Through his position as leader of his party and through the place he may win for himself as leader of the whole nation, his influence over Congress is enormously increased. He may prepare, or cause to be prepared, bills which by indirect methods he may have introduced in Congress. He can influence legislation by holding conferences with groups or individuals in Congress. At critical times he may win the favorable votes of legislators for his projects by skillfully using his constitutional power to make appointments to office.¹⁸ To men-

¹⁶ *United States News*, January 10, 1938; Mathews and Berdahl, *op. cit.*, pp. 281-287.

¹⁷ W. E. Binkley, *The Powers of the President* (1937), Chs. X-XIV; P. Herring, *Presidential Leadership: The Political Relations of Congress and the Chief Executive* (1940); H. J. Laski, *The American Presidency: An Interpretation* (1940), Ch. III.

¹⁸ The appointing power is not, of course, an extra-constitutional power; but it may be fairly classified as such when it is used for the purpose of influencing legislation.

tion just one other means at his command, he may appeal to the people either directly or indirectly for their support for a particular measure or policy, or on behalf of congressmen who stand with him.

1. Authority through party leadership. The President, whether he likes the idea or not, is responsible for the legislative program of his party. The millions who elect him look to him to carry out the announced policies of the party and, more particularly, those he announced during his campaign for election. The people do not want a President who is timid in his relations with Congress. He is quite likely to win popular applause if he boldly takes command of the legislative bodies and pushes through his projects. Furthermore, legislators find it to their advantage to accept executive leadership. A congressman who belongs to the same party as the President can make a much more effective appeal to the voters of his district on his record in support of the President than on a record of opposition or half-hearted support. The political fortunes of senators and representatives are rather closely tied up with those of the President, and it would be the veriest folly for the majority of them to ignore this fact and chart an independent course. Presidential leadership in legislation is further strengthened because it is not possible for a single individual in either House of Congress to assume such leadership. The two Houses are equal in legislative matters, and some jealousy exists between them. A member might lead one House or the other, but not both. The President alone can supply the necessary unity of command.

SOME EXAMPLES. It goes without saying that some Presidents are more successful in directing legislation than others; but all of our strong executives since the Civil War have effectively led Congress when its majorities were of the same political faith as the President. Theodore Roosevelt dominated his Congress, and Wilson's power was felt even more forcibly at the Capitol. The Federal Reserve Act, the Income Tax Law, the Clayton Act, the Adamson Law, and many another went through Congress under the skillful direction of President Wilson. We repeat that the people expect the President to take the lead in legislation. Aggressive Presidents are glad to assume it, and those who would shun it find that they are urged from all sides to follow the example of their more "congressionally minded" predecessors. Harding took office in 1921 with the firm resolve to let Congress alone, but he had not gone far with this plan when he found that it would not work. In like manner, Hoover found that he should attempt to lead Congress. Democratic leaders in Congress turned to Roosevelt as their generalissimo immediately after his election in 1932, not waiting for the following March 4.

2. Administration measures. In a parliamentary system of government like that of Great Britain, all of the important bills are introduced in Parliament by the executive department; but our presidential system,

based upon the principle of the separation of powers, did not contemplate any such procedure. The Constitution provides that the President shall from time to time recommend to Congress "such measures as he shall judge necessary and expedient," a clause which can hardly be interpreted as granting to the President the right to introduce bills. Nevertheless, a system has developed which amounts to that in practice. The procedure is for some congressman, a supporter of the President, to introduce formally the bill the administration has prepared; or the measure may be sent directly to the appropriate committee, which will probably introduce it. These administration measures, coming directly from or having the backing of the President, are usually given special consideration; and, if the President's party has a majority in Congress, they have a good chance of being enacted into law. While congressmen may periodically complain of this extension of executive influence, the practice is a most logical one. The President and the officers of the departments, in their everyday task of administering the affairs of the government, learn the defects of existing laws and the need for new laws. Consequently, they are in a much better position to frame bills covering the needs of the administrative services than a member of Congress or even a committee of either House. For instance, Congress might do much worse than accept a bill relating to foreign service drafted by officers of the Department of State, or a bill relating to the public lands drafted by an upright and intelligent Secretary of the Interior. Nearly all of the important measures enacted during Franklin D. Roosevelt's administration were drafted by his administrative experts. Two notable administration measures failed to meet the approval of Congress, the bill to make the Supreme Court more amenable to presidential influence (1937) and the bill to reorganize the executive branch of the Government (1938).

In the emergency year of 1941 important measures, accompanied by a letter from the President, were sent to some representative or senator, and by him introduced. "The committees concerned held hearings on the measures, but most of the time in each instance was consumed by Administration officials testifying in support of the legislative or appropriation bills. . . . The bills were then passed by each chamber nearly as reported. Should one chamber insist on writing in 'undesired' amendments, such provisions were more than likely to be changed or wiped out by the other body, or at least modified in conference. Thus only a few paragraphs of legislation and hardly any entire public laws were finally enacted contrary to the will of the Administration."¹⁹ Having followed the dictates of the Administration, senators and representatives, even members of the President's own party, complained of Executive control.

¹⁹ F. M. Riddick, "First Session of the Seventy-seventh Congress," *Am. Pol. Sci. Rev.*, XXXVI, 300 (April, 1942).

In 1942 the situation was not different, and many were the congressmen who attributed their misfortunes in the November elections to popular reaction against Administrative influence over Congress. It may have been, however, that the people rebuked Congress not for following the President, but for not going beyond his relatively moderate recommendation on war finance and inflation control. Furthermore, the people had not entirely forgotten that congressmen had voted themselves annuities and had taken "X-cards" for gasoline.

3. **Influencing legislation by conferences.** Whether the bills have emanated from executive sources or have been initiated by members or committees of Congress, the President keeps a watchful eye upon those over which he is vitally concerned. At times he is as interested in accomplishing the defeat of a particular measure as he is in securing the passage of another. Often leaders of his party in the House or Senate, or even leaders of the opposing party, will go of their own accord to the White House to discuss legislation. Not infrequently the President will make the first move and will summon them for a conference. "Come up some evening for a long talk," wrote Theodore Roosevelt to "Uncle Joe" Cannon, Speaker of the House. (Come) "about 9:30, if you can, so that we will be free from interruption."²⁰ It is hardly necessary to say that at a conference the President may learn that a favorite bill has no chance of passage; that he must accept important amendments to another; that a particularly objectionable measure will probably be enacted. On the other hand, he is often able to win the leaders to his side in a number of matters and thus be assured of early and favorable action in Congress. A competent executive who knows the temper of Congress can bring many important issues to a successful termination by these informal conferences.

4. **Use of the patronage.** In the last chapter we learned something of the extent of the President's appointing power and of the interest of senators and representatives in securing their share of the offices for their constituents. Obviously, a politically minded President can use the large patronage at his disposal for the purpose of winning the support of congressmen of his own or of the opposing party. Lincoln believed in 1864 that the adoption of the constitutional amendment prohibiting slavery would save him the necessity of raising another million men to defeat the Confederates. A careful canvass of the states showed that the necessary three-fourths vote for the amendment was by no means certain. Consequently, it was decided that another state, Nevada, sure to vote in the affirmative, should be admitted to the Union. In order to secure the necessary majority in the House of Representatives for the admission of

²⁰ Herring, *Presidential Leadership*, p. 50, from L. W. Busbey, *Uncle Joe Cannon* (1927), p. 216.

Nevada, Lincoln brought three representatives to his side by giving them the privilege of naming three appointees to lucrative offices.²¹ Cleveland is said to have used the same tactics in bringing about the repeal of the Sherman Silver Purchase Act. A senator is reported to have declared, "Mr. President, the act will not be repealed until the nether regions freeze over." The President, having just completed a patronage agreement with some of the senator's colleagues, triumphantly asserted that the freezing would take place within two hours. Such definite bargains are probably uncommon, but congressmen are not likely to forget that the President has the power to reward and punish them through his distribution of the patronage. In March, 1933, as the House was about to take a vote on the President's economy bill, a Democratic representative said: "When the *Congressional Record* goes to President Roosevelt's desk in the morning, he will look over the roll call . . . and I warn you new Democrats to be careful where your names are found."²² Hisses and groans did not obscure the representative's point. Indeed, they added emphasis to it.

"Lame duck" appointments. It is not an uncommon practice for a defeated congressman, frequently somewhat unsympathetically referred to as a "lame duck," to receive an appointment to an administrative office. In some cases the consolation prize has been more valuable than the seat in Congress. It is clear that the possibility of securing through presidential appointment a place of profit and possibly a place of high honor in the event of enforced retirement from Congress may serve to keep the President's copartisans at the Capitol in harmony with his program. This is not to say that many such appointees may not be quite competent to fill responsible civil offices, but only that through standing by the President they may place themselves in line for them.

5. Appeals to voters. It was pointed out above that if the President has the public on his side many congressmen will feel compelled to support him in order to square themselves with their constituents. If he does not have the confidence of the public, he can hardly hope to lead Congress. Recognizing these facts, Presidents make every effort to win popular approval for their policies. The inaugural address may do much to mollify elements which were disgruntled during the campaign. A message to Congress may be so skillfully framed that it strikes a popular chord. A heart-to-heart talk with the people in some anniversary address may win general admiration for the man who more than anyone else carries the public burden. In conferences with newspaper men, in interviews with influential citizens, in conversations with friends who help interpret the executive to the public, and in various other ways, appeals may be subtly made to the nation. Some Presidents have made direct appeals to the people. Jackson and Johnson both went so far as

²¹ C. A. Dana, *Recollections of the Civil War* (1902), pp. 174-177.

²² Herring, *op. cit.*, p. 59.

to pose as their champions against the machinations of Congress, the former succeeding and the latter miserably failing in the attempt. Theodore Roosevelt effectively appealed to the country to support Republican candidates for Congress in 1906; but Wilson's appeal for a Democratic Congress in 1918 invoked lively resentment and perhaps alienated some independent voters who otherwise would have supported the Democratic candidates. The next year Wilson went directly to the people on the League of Nations issue, but his physical collapse while on the speaking tour left the efficacy of such an appeal undecided. The President who goes directly to the people in order to subject Congress to public pressure is playing a hazardous game. Even if the cause is just and the President brilliant, the public may not approve of the Executive's attempt to coerce the lawmaking bodies, especially when there are scores of congressmen, some able and others clever, who hold up the bogey of executive autocracy and usurpation.²³

"*Good evening, my friends*". The possibilities of reaching the American people by radio have been demonstrated most fully by President Roosevelt who, with the familiar greeting which heads this paragraph, has caused millions of citizens to edge closer to their radios to hear his report on "the state of the Union." We quote from *Time*:²⁴

For the second time [on May 7] Franklin Roosevelt was "reporting" to the country from the White House. Eight weeks prior when the country was dying by inches his first broadcast on the banking crisis had been a historic success. His second attempt to clear and steer the public mind on issues of state produced a popular reaction no less favorable.

President Roosevelt's speech, simple and sympathetic, was more than a review of his two months in office, more than a recitation of the purposes of his Civilian Conservation Corps, his Tennessee Valley Plan, his mortgage and farm relief bills, his railroad legislation. For the baffled businessman who wondered whither he was being led, it was a look into the future. To many that future had looked like an era of State Socialism, with the Government's grip fixed hard and fast upon industry, agriculture, transportation. To others it seemed as if Congress were abdicating its Constitutional powers to the White House. The country appeared in the thick of a gigantic social and economic revolution, quiet but nonetheless real, the direction and philosophy of which the average citizen did not begin to comprehend.

President Roosevelt gave no such view of the national situation. Deftly he turned aside the "dictatorship" charge by pointing out that Congress still retains its Constitutional authority and has done nothing more than designate him as its agent in carrying out its will, all in keeping with U.S. tradition. As for the Government's relations with industry, agriculture, and transportation, the President explained them not as those of a Socialist State and its servants but as those of business partners, "not a partnership in profits, because the profits would still

²³ The resentment aroused by President Roosevelt's interference in the Democratic primaries of 1938 was noted in Chapter 7, sec. I.

²⁴ May 15, 1933, p. 9.

go to the citizens, but rather a partnership in planning and a partnership to see that the plans are carried out."

How Congress controls the President. We must not exaggerate the President's power to control legislation. While it is true that the President has many advantages over Congress, it is by no means true that he easily directs the legislators along the paths he would have them follow. He cannot drive them; he must work with them. No President is independent of Congress, and the Executive who is unfitted by experience or temperament to work in harmony with the co-ordinate branch of the government is in imminent danger of having his program wrecked by it. The Senate may defeat the best of treaties which he submits for its approval, and it may withhold its assent from appointments which he regards as most desirable. The two Houses may refuse to vote appropriations for needed public services, while supplying funds for those which serve only political purposes. They may neglect to enact measures to meet new conditions, or fail to repeal laws which have proved to be in conflict with the public interest. Provided a two-thirds majority in both Houses concur, they may pass, in opposition to the President's wishes, bills which fundamentally change the organization of the administrative services and the duties of its officers. They may harass the President by repeated calls for information concerning the work of the departments, and by officially investigating their activities. The enumeration might be continued; but we conclude with the mention of the power of the House of Representatives to impeach all civil officers, the President included, and of the power of the Senate to try such impeachments. Now, of course, we do not mean to imply that Congress is continually thwarting the Executive, but we do wish to emphasize that it has the power to do so. The two political branches of the government, executive and legislative, must work together. They must give and take. A strong, wise, and tactful President, supported by a majority in the two Houses, is usually able to lead Congress. A President who lacks the characteristics mentioned, or whose party is in the minority at the Capitol, will frequently be obstructed, or possibly even controlled, by Congress.

V. THE ADMINISTRATIVE RULE-MAKING POWER ²⁵

Not only do the President and other high-ranking administrative officials influence the course of legislation in various ways, but they also have the authority to make rules and regulations which have the force of law. Some of this authority—for example, the authority to make codes

²⁵ F. F. Blachly and M. E. Oatman, *Federal Regulatory Action and Control* (1940); James Hart, *The Ordinance-Making Powers of the President of the United States* (1925), and his "The Exercise of the Rule-Making Power," in the *Report* (with special studies) of the *President's Committee on Administrative Management* (1937).

for the government of the armed forces and for the conduct of foreign relations—comes direct from the grants of power to the President by the Constitution. The great bulk of the rule-making authority comes, however, from the statutes of Congress. That body cannot and should not provide for the details of administration. The better procedure is for Congress to pass a law declaring a *policy* and to leave with the President and other administrative officers *discretion* in carrying this policy into effect. The flexible tariff law furnishes a good example of this. In proclaiming the validity of the flexible tariff act of 1922 the Supreme Court said: The plan of Congress “was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of production in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. . . . Because of the difficulty in practically determining what that difference is, Congress seems to have doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds. . . . As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary.”²⁶ Thus the President, advised by experts, was authorized to increase or decrease the tariff rates in accordance with the declared policy of Congress. The President was not authorized to make tariff laws; rather he was charged with the duty of making administrative regulations to put and keep in effect the tariff law which Congress had enacted. The regulations so promulgated generally have the full force and effect of law.

Limits of the administrative rule-making power. The emergency which faced the country in 1933 prompted Congress not only to pass, at the President's request, unprecedented measures, but also to give the Chief Executive the most sweeping discretionary powers in putting them into effect. In some of these measures Congress announced policy only in its broadest outlines, leaving the President and his associates to work out details of policy as well as details of administration. Thus, an economy bill gave the President a very wide discretion in reducing salaries and pensions. Another measure gave him broad powers of control over the currency. The National Industrial Recovery Act gave him the authority to put into effect codes of fair competition. This last act was one of several which the Supreme Court held unconstitutional on the ground that legis-

²⁶ *Hampton v. United States*, 276 U.S. 394 (1928).

lative power had been delegated to the Executive. Said the Chief Justice, speaking for a unanimous Court: The act "supplies no standards for any trade, industry, or activity. . . . Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them . . . In view of the . . . nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade or industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."²⁷ In other words, here is the limit of the doctrine expounded in the flexible tariff case. This decision did not, however, place any serious limitation on the power of Congress to delegate to the President and other administrative officials the authority to make rules to carry legislative policy into effect.

How the rule-making power is exercised. Under powers granted to the President by the Constitution to command the Army and Navy and to conduct foreign relations elaborate codes have been promulgated for the regulation of the armed forces and the diplomatic and consular service. And under authority granted by the Constitution and more particularly by Congress the President and many other administrative officers and agencies (perhaps a hundred) prepare and promulgate codes, rules, orders, and directives on the customs service, the civil service, the postal service, agricultural production, transactions in securities, radio communications, and a wide variety of other subjects. It is perhaps unnecessary to say that the President personally attends to but little of this administrative law-making. Much of it requires his signature, but the actual work is done by others. In 1943 we find Congress still enacting the laws, but that hundreds of Government lawyers working in scores of departments and agencies, translate these laws into active regulations touching the lives of citizens in dozens of ways. They tell the manufacturer what he may make, the farmer what he may grow, the employer how he must deal with his employees, the employee how much he may earn, the housewife what she may buy, the car-owner how much gas he may use, the husband whether he may wear cuffs on his trousers or a double-breasted coat and the wife whether she may wear silk stockings or a girdle. Of course a number of these regulations are based upon war legislation, but the process goes on in peacetime as well, the only difference being that it is slowed down a bit and the regulations may touch the average citizen in fewer particulars. Regardless of the origin of a regulation or order, it must go to the Director of the Budget who gives it the "once over" for the President. From "the Budget" it goes to the Attorney General, who checks it for its form and legality. The Director of the Office of Price Administration, the Director of the Office of Economic Stabilization, the

²⁷ *Schechter v. United States*, 295 U.S. 495 (1935).

Chairman of the War Production Board, and such unofficial advisers as Bernard M. Baruch should be associated with the Director of the Budget and the Attorney General as the leading figures in the preparation of these administrative regulations and executive orders. This group has been designated as the "Kitchen Congress," a term suggested by President Jackson's "Kitchen Cabinet." During one year of war 890 executive orders were prepared for President Roosevelt and received his signature. During the same period, executive agencies issued a five-foot shelf of directives, orders, and rules. The administrative rule-making procedure did not come in with any recent administration, and it will not be abolished by any change in administration. "Executive orders have long been used," declared the President's Committee on Administrative Management (1937). "They are particularly necessary in periods of emergency when there is rapid change in governmental policies and organization. Executive direction and control of national administration would be impossible without the use of this device."²⁸

Distrust of the rule-making practice. The popular conception is that Congress makes the laws, and when the general body of citizens becomes aware (as in 1943) of the extent to which administrative departments and agencies are charged with the duty of promulgating regulations to carry laws into effect, suspicion and resentment are likely to arise. Such reaction may indicate a great deal of ignorance of the process of modern government and it may even be largely partisan in its nature. Nevertheless, the theory that Congress should not delegate power to the President and his administrative subordinates dies hard, and there are frequent orations in the Halls of Congress against such delegation of authority. Recently, and as a necessary procedure in carrying on a great war, Congress has broken the record on the matter of delegating authority to the President, and to allay the misgivings of many of its members it has inserted in a number of enactments a clause under which it claims that the authority delegated to the President may be reclaimed by Congress at any time. Such acts carry the provision that they may be terminated by concurrent resolutions of Congress. If the practice of a century and a quarter is followed (and there is no doubt that Congress will insist upon it) such concurrent resolutions will not be submitted to the President for his approval, and the President may find the authority delegated to him withdrawn without his consent. It may happen, however, that the Supreme Court would hold these concurrent resolutions subject to the President's veto. There the matter rests for the time being.²⁹

²⁸ Quoted in *United States News*, December 11, 1942, p. 13. This *News* article explains, in language the layman can understand, the process of rule-making as it operates today. See also J. R. Pennock, *Administration and the Rule of Law* (1941), pp. 38-40.

²⁹ Howard White, "Executive Responsibility to Congress via Concurrent Resolution," *Am. Pol. Sci. Rev.*, XXXVI, 895 (October, 1942).

VI. THE QUESTION OF A CLOSER UNION BETWEEN THE EXECUTIVE AND THE LEGISLATIVE BRANCHES ³⁰

It is obvious to all except the most superficial observers that the national administration cannot function smoothly unless there is co-operation between the executive and the legislative branches. The separation of powers, designed in a day when governments had little to do besides keep the peace, served very well as long as governments had only negative functions to perform. The positive functions are the all important ones today, and they cannot be discharged under a rigid system of "checks and balances." For the purpose of carrying out the many services of modern government, co-operation of President and Congress is often achieved by informal and extra-constitutional means. In recognition of this fact and in order to strengthen further the ties between the two political divisions, some statesmen and scholars have advocated the establishment of more definite and formal connecting links between the administrative and legislative branches of the government. Several of these proposals are here considered briefly.

1. **The proposal to admit administrative officials to the floors of Congress.** On a number of occasions the proposal has been made by responsible authorities that heads of the executive departments—Cabinet members—be admitted to each House of Congress for the purpose of giving information, advice, or participating in discussion. During Washington's administration this plan was started, but it did not develop into an established practice, although the executive and legislative branches usually had various connecting lines, chiefly of a subterranean character. In 1864 a committee of the House of Representatives recommended that a law be enacted to give department heads seats (but not votes) in each House, and a committee of the Senate made a similar recommendation in 1881. On the under-cover influences at work, the latter committee said in part: No one familiar with procedure in Congress "can have failed to discern the influence exerted upon legislation by the visits of the heads of departments to the floors of Congress and the visits of the members of Congress to the offices in the departments. It is not necessary to say that the influence is dishonest or corrupt, but that it is illegitimate; it is exercised in secret by means that are not public—by means which an honest public cannot accurately discover and over which it can therefore exercise no just control." The committee would bring this into the light of day and strengthen the ties between the two great branches of the government by requiring Cabinet members to appear regularly before Congress.³¹

³⁰ W. Y. Elliot, *The Need for Constitutional Reform* (1935) Chs. IX-X; Herring, *op. cit.* Ch. IV; Laski, *op. cit.*, Ch. V; A. L. Lowell, *Essays on Government* (1889), pp. 25-45 R. Luce, *Congress—An Explanation* (1926), pp. 110-116.

³¹ *Senate Report*, No. 837, 46th Cong., 3rd Sess. (1881).

TAFT'S STRONG RECOMMENDATION. Nothing having come of the proposal, President Taft took it up in his message to Congress, December, 1912. He contended that "the rigid holding apart of the executive and the legislative branches of this Government has not worked for the great advantage of either. . . . The legislative and the executive each performs its own appropriate function, but these functions must be co-ordinated. Time and time again debates have arisen in each House upon issues which the information of a particular department head would have enabled him, if present, to end at once by a simple explanation or statement. Time and time again a forceful and earnest presentation of facts and arguments by the representative of the Executive whose duty it is to enforce the law would have brought about a useful reform by amendment, which in the absence of such a statement has failed of passage."³²

MERITS OF THE PLAN. A great deal can be said for the plan. It is not particularly revolutionary, and an act of Congress is all that is necessary to put it into operation. Its adoption would be a logical step in the direction of bringing those who make the law and those responsible for its administration into closer relationship. It would make possible a definite legislative program and it would concentrate discussion on that program. It would probably expedite the public business when the President's party has a majority in each House of Congress. With a President and Congress of the same party, that party would be more definitely responsible for the conduct of the government. But with the President of one party and the majority of the members of Congress of another, the majority legislators might spend altogether too much time in embarrassing and harassing department heads. Indeed, it might be possible for a minority in either House to resort to obstruction tactics and defeat the purpose for which Cabinet members were given seats in the legislative chambers.

THE POSSIBILITY OF ITS ADOPTION. Our public servants understand the informal and extra-legal means by which Presidents and Congresses have managed to "get along" for several generations. They are not sure that the change recommended would be for the better. At any rate, they would have to learn a new technique if it were adopted, and men well on in life are usually very hostile to new technique. It was thought that Wilson would urge Congress to pass a bill embodying the principles of the plan, and had he done so it is probable that he would have been heeded; but he successfully directed Congress with the means at his command, and he may have felt, not unwisely, that by placing Cabinet members in Congress he would lose some of his power and influence. In 1921 three bills providing for the plan were before Congress, and bills are still being introduced; but they have all failed of passage. A measure to grant Cabinet members the right to participate in Congressional de-

³² Mathews and Berdahl, *op. cit.*, pp. 331 ff.

bates was introduced and discussed in the House in 1935,³³ but it cannot be said that the majority was influenced by the discussion, although the practice of sending administration measures to Congress increases the desirability of having spokesmen for the Administration present to explain and defend the bills.

2. The proposal to make heads of departments members of Congress. A proposal which meets with nothing like as much favor as the one just discussed is that department heads be given votes as well as seats in Congress—in other words, that they be made members of Congress. It is hardly necessary to point out that this proposal calls for a constitutional amendment, since the Constitution prohibits any person holding office under the United States from being a member of Congress. The proposed change is decidedly in the direction of the parliamentary system of government. This system has unquestioned merits and it has given satisfactory results in a number of countries, notably in English-speaking countries. But this is a poor argument for its adoption or for any sudden moves toward its adoption by the United States. Political institutions grow up with a country more or less in accordance with its needs. Transplanted institutions are likely to wither and die. It is notorious that the parliamentary system has proved to be unsatisfactory in some Continental countries which borrowed it from England. The English would no doubt come to grief if they attempted to use our presidential system of government, and any attempt on our part to install their system or a major feature of it would be quite likely to have mischievous results in this country. Statesmen and students of government are in general accord on this point, and they therefore oppose extending the privilege of membership in Congress to the heads of the executive departments or to other administrative officials.

Other proposals. Frequent misunderstanding between the Senate, or both Houses of Congress, and the President over the conduct of foreign relations has led statesmen and scholars to cast about for a method of insuring more harmony. Perhaps the best suggestion made is that a joint committee of the two Houses, representatives of the State Department, and possibly certain other executive departments, and of the general public be constituted as a group for the formulation of broad international policies.³⁴ Another interesting proposal relates to the Federal Budget. Before 1921 the budget was prepared in a hit or miss fashion by a number of committees of Congress. The Budget Act of that year gave the President the duty of preparing and submitting it to Congress. But the budgeting and appropriating process should be a joint enterprise of the Executive and Congress, explains Harold D. Smith, the present Director of the Budget. Perhaps an Executive-Congressional com-

³³ *Congressional Record*, 1935, pp. 1999-2002, 2758-61.

³⁴ R. L. Buell, *Isolated America* (1940), p. 452.

mittee on the Budget could be constituted, but the only proposal which seems to interest Congressmen, and it is not without value, is that the revenue and appropriations committees of the two Houses, or representatives of these committees, serve as a budget-review agency.³⁵ A proposal suggested by the experience of several of the states is that there be established a national legislative council to be composed of senators and representatives working in close harmony with the executive branch of the government. Such a council might save money, time, and otherwise expedite the public business.³⁶ It should be borne in mind, however, that the best machinery soon breaks down without oil, and that the principal lubricant in any government machinery is the spirit of interplay of its component parts.

VII. A PRACTICAL VIEW OF THE PRESIDENT'S POWERS

As we think back over this discussion of the Chief Executive it becomes clear that his position and powers are not fully set forth in the Constitution. We must take notice of the provisions of statutes. Having done this we are still a long way from understanding the office of President. To the Constitution and statutes we must add the qualities of Presidents, the temper of the American people, and the needs of the times, all of which are variable quantities. When the country is tranquil and prosperous, the people are in no mood to tolerate an Executive who does not live his official life well within the provisions of the Constitution and statutes. In less happy or in tumultuous periods, the people want action and woe betide the President who hesitates to take it. "He didn't do nothin', but that's what we wanted done." A popular humorist thus characterized one of our "normalcy" Presidents who had the country's acclaim. Even greater acclaim was accorded Roosevelt, when, in his inaugural, in 1933, he said: "We must act, and act quickly. . . . It is to be hoped that the normal balance of executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But in the event that the Congress shall fail I shall ask the Congress for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe." Still greater applause greeted his action the next day, a proclamation closing every bank in the United States in order to end the banking crisis. By what authority was the proclamation issued? A semblance of authority was found under the Trading-with-the-Enemy Act of 1917, and that was all. But, in the language of Edmund Randolph at the Philadelphia Convention, "when the salvation of the Republic was at stake," neither the President nor the

³⁵ Herring, *op. cit.*, pp. 81 ff.

³⁶ *Ibid.*, pp. 77 ff.

country which wanted action was "scrupulous on the point of power." Meeting in special session a few days later at the President's call, Congress approved what he had done, and, at his request, passed a measure giving him sweeping powers over banking and currency, all within a few hours and before many members could learn the contents of the bill they had enacted with a "unanimous roar." The country applauded again, and continued to applaud as the President made it clear that he intended not only to administer the executive department but also to direct the activities of Congress. We repeat, the powers of the President are those authorized by the Constitution and statutes (as interpreted by the Supreme Court), plus the capacity of the President for leadership, plus the temper of the public, plus the demands of the times.

For reading list, see references at the end of Ch. 10.

The Governor



Having discussed the powers and duties of the Chief Executive of the nation, we can now logically turn our attention to the state's "supreme executive," the governor. The student will find that constant comparisons of the powers of the two executives will be very helpful toward a better understanding of both. Another suggestion: remember that there are forty-eight states and that they differ somewhat in the details of their political organization. It is understood, therefore, that when we speak of the governor in general terms, we refer to the governor of a typical state, making due mental allowances for variations from the general rule.

I. QUALIFICATIONS, TERM, REMOVAL, AND COMPENSATION

Qualifications. State constitutions commonly stipulate that the governor shall be a citizen of the United States; that he shall have resided in the state for a specified number of years—usually five; and that he shall have attained an age—thirty is the usual requirement—which is supposed to indicate maturity. None of these qualifications need be expressed in constitutions or law, for they would be enforced by the voters in any case. One can easily imagine the opposition's attacks upon the candidate who lacked them or any of them. "Are we going to let this 'foreigner' rule over us?" "Can this drawling Southerner tell us Westerners how to run our state?" "The little child shall lead them!" On rare occasions a man may move from private life to the governor's chair; but usually he has served as Congressman, or in some executive position in the state, or in the state legislature, or in some other public office.

Nomination and election. In a substantial majority of the states the candidates for governor are nominated in the direct primary. The convention system is used in the others. In every state except Mississippi the governor is elected by direct vote of the people. The Mississippi plan, somewhat on the order of our system for electing the President, calls for election by a popular and an electoral vote. Since nominations, campaigns, and elections were rather fully discussed in special chapters on those subjects, it is unnecessary to deal further with them in this section.

Term and tenure. The framers of the original state constitutions feared "tyranny," and one of their means of guarding against it was

the short term of office. Consequently, governors were commonly given one-year terms. It developed, however, that such short terms were not only unnecessary, but decidedly disadvantageous, calling for frequent elections and all too frequent turnovers in state administration. During the past century the tendency has been in the direction of lengthening the terms. The term is now fixed at two years in half the states, three years in New Jersey, and four years in the others. A few states, fearing the construction of a political machine by the governor and its use in continuing him in power, have made the chief executive ineligible for the term next succeeding. In other states it is not uncommon for the governor to serve two or even three consecutive terms. Smith was elected Governor of New York in 1918, 1922, 1924, and 1926, and his record was matched by Governor Herbert Lehman (1933-1942).¹

Impeachment. In every state except Oregon the governor may be removed from office by impeachment. The charges are commonly voted in the lower house of the state legislature, and the question of guilt is decided by the state senate. Recent governors so removed were: Sulzer of New York (1913); James E. Ferguson of Texas (1917); J. C. Walton of Oklahoma (1923), and Henry S. Johnston of the same state (1929). Impeachment proceedings are frequently criticized because on occasion they are used for political reasons rather than for any high crimes or misdemeanors a governor may have committed. The impeachment method is further criticized on the ground that it is difficult to bring it into use when it is needed. Regular sessions of the legislature are ordinarily held only once in two years; and, since they are short, there is little time for an impeachment. Usually special sessions may be called only by the governor, and he is not likely to call a session to consider his impeachment. Impeachment is a gun practically without stock or barrel as far as the governor who holds office only two years is concerned; for the legislature meets about the time he takes the oath of office and adjourns before he has hardly had time to become guilty of serious misconduct in office.²

The recall. In realization of the limits of impeachment and in accordance with democratic tendencies in government, about a fourth of the states have adopted the recall. After a petition has been signed by the number of voters required by the state constitution, the day is fixed for the recall election, and the electors go to the polls and vote for or against the governor's removal. The advantages of the recall over impeachment are that it may be invoked at any convenient time and on any charge, political or legal, while impeachment may fairly be used only when the execu-

¹ Although elected for the same number of terms as Smith, Lehman served two years longer because, in 1938, the term was changed to four years.

² On impeachment see N. F. Baker, "Some Legal Aspects of Impeachment in Louisiana," *The Southwestern Pol. and Soc. Sci. Quar.*, X, 359 (March, 1930); F. M. Stewart, "Impeachment in Texas," *Am. Pol. Sci. Rev.*, XXIV, 652 (August, 1930); C. A. M. Ewing, "The Impeachment of Oklahoma Governors," *Am. Pol. Sci. Rev.*, XXIV, 648 (August, 1930).

tive has violated the laws respecting his duties. Governor Lynn J. Frazier and several other officers of North Dakota were recalled in 1921. It is an interesting commentary on democracy that Frazier was elected to the United States Senate a year later.

Although Governor Frazier was guilty of no crime or misdemeanor, there is no grave charge to be lodged against the people of North Dakota for his recall. That procedure is political in its design. On the other hand, impeachment is supposed to be judicial in character, and the legislatures which have not infrequently employed it as a political weapon are subject to strong censure. It should be a matter of national gratification that the political impeachment of President Johnson failed to result in conviction, and a point of deep regret that political impeachments in the states have not similarly failed. As might be expected, if governors guilty of no crime have been removed by impeachment proceedings, a few crooked and jail-bird governors have not been disturbed by the impeachment process. On occasion, the courts are called upon to take action before impeachment proceedings are instituted, or when such proceedings seem not to be contemplated. Federal courts sent a governor of Indiana, Louisiana, and of North Dakota to the penitentiary; but the courts of Illinois failed to convict a governor who was clearly guilty of having converted public funds to his own use.³ It is a pleasure to report, however, that the great majority of American governors do not merit retirement to private life by extraordinary means and that still fewer of them belong in the penitentiary. Some demagogues there are among them, but as a class they are worthy public servants.

Gubernatorial succession. The recall operates very much the same as a regular election, the governor (or any other official) against whom the recall is invoked and other candidates for that office being listed on the ballot. If the recall is successful, a new governor is elected at the same time. But in case of the impeachment, death, or resignation of a governor, the officer designated by the constitution as his successor is elevated to the place, just as the Vice President succeeds to the presidency. In some thirty-five states the lieutenant governor takes the governor's chair. In other states, the president of the senate or the speaker of the lower house takes the office.

Compensation. The governor's salary is fixed by the constitution in some states; but fortunately there is a growing tendency to leave the amount of compensation to legislative determination, which makes possible the much-needed increase without the hazard of a popular vote on the question. The salary is usually low, averaging not much more than \$7,500 per annum. Pennsylvania, New Jersey, and New York provide salaries of \$18,000, \$20,000, and \$25,000 respectively; and these may be regarded as the only states in which any liberality is shown in the matter

³ W. B. Graves, *American State Government* (1941 ed.), p. 355.

of compensation. The states commonly furnish an executive mansion, and often allow modest sums of money for expenses which are not entirely of a public nature. In spite of the relatively small compensation governors receive, the office does not go begging.

Possibility for future honors. Many able and distinguished men are glad to accept the honor. In addition to being the place of highest honor in the state, it is by no means a blind alley politically. Literally scores of governors have become United States senators; a number of others have received important federal appointments; some have been made Vice President; and everyone knows that Cleveland, McKinley, the two Roosevelts, Wilson, Coolidge, and several other Presidents touched the governor's round in their climb to fame.

II. THE GOVERNOR'S EXECUTIVE POWERS ⁴

The governor is not the only executive officer of the state. The executive power is divided among the governor, secretary of state, and other officers. The governor is usually designated by the constitution as the "supreme executive" and charged with the duty to see "that the laws are faithfully executed"; but the courts have almost invariably held that these seemingly broad grants of power give the governor no definite authority—that his powers must come from other and definite provisions of the constitution or statutes. In other words, in construing the provisions of the constitution relating to the governor's powers, the courts have followed the principle of strict construction, with the result that the executive powers of the governor have not been developed through the years as have those of the President. We should add, however, that a number of states have been strengthening the position of the governor as an executive during the past half century. Acting primarily in the executive capacity, the governor exercises some supervision over administration, a limited appointing power, a still more limited power of removal, grants pardons and reprieves (a restricted power in some states), and performs miscellaneous duties incident to the executive power.

1. Supervision of administration. The governor's power to supervise the state administration is usually grossly inadequate. The other executive officers elected along with the governor very naturally feel their responsibility to the people rather than to him. The governor's power to appoint subordinate administrative officials is subject to considerable limitation, and his removal power is severely restricted. The duties of state executives and administrative officers are rather minutely regulated by

⁴ W. F. Dodd, *State Government* (1928 ed.), Ch. VIII; J. A. Fairlie, "The Executive Power in the State Constitution," *Annals of the Am. Acad. of Pol. and Soc. Sci.* (September, 1935), pp. 59-73; A. N. Holcombe, *State Government in the United States* (1931 ed.), pp. 333-352; J. M. Mathews, *American State Government* (1934 ed.), pp. 302-320.

statutes. The control over them is legislative and judicial rather than executive. In a number of states the governor may force his "subordinates" to act only by the cumbersome method of instituting court proceedings against them. Furthermore, in taking care that the laws are faithfully executed, the governor must depend not only upon state officers but upon local officers such as sheriffs and district attorneys—officers over whom he has even less control than over the state officers, except in five or six states. In short, the governor as a director of administration is far from being in the independent position occupied by the President. The national administration is largely centralized. Lower officers are responsible to higher officers, and these to still higher officers, until the responsibility rests finally with the President. In the states there is no hierarchy of administration, each office or board or commission being regulated rather minutely by law, the administrative "superiors" usually having only a shadowy directing power.

Still, the people expect the governor to see that the laws are faithfully executed, and these executives usually do the best they can with the means at their disposal. They use the powers of appointment and removal as far as they have them; they require reports from the various administrative officers concerning the work of their departments; they investigate the conduct of officers; they make use of whatever political influence they have in securing effective co-operation of officeholders; and the more skillful of them may use publicity as a means of forcing desired action on the part of officers over whom they have no definite control.

INCREASING THE POWERS OF DIRECTION. In some states which have re-organized their administrative system, the governor is placed in a position from which he can exercise a much more effective control. Thus, in 1917, Illinois gathered together a tangled wilderness of some sixty state agencies and placed them in nine departments (ten since 1934), each headed by a director appointed by the governor and senate for a term of four years. Assistant directors and bureau chiefs are appointed in like manner, but they work under the immediate supervision of the department heads. The governor directs administration through the ten heads of departments, and he may form a cabinet with them if he cares to do so. About half of the states—including New York, Pennsylvania, Virginia, and Washington—have followed in the main the Illinois plan.

2. Appointments. The excesses of democracy before the middle of the nineteenth century deprived the governor of practically all the power of appointment. But the choice of administrative officers by popular election (or sometimes by legislative election) proved unsatisfactory in most cases, and in many instances notoriously corrupt. Consequently, since about 1850, the governor has been recovering his appointing power, until in most states he now names the great majority of the important administrative officers.

LIMITATIONS ON THE POWER. It cannot be said, however, that the governor's appointing power is as large as it should be, or, relatively, as extensive as that of the President; for even in those states in which the governor's power has been recently increased, it is common to find the secretary of state, the treasurer, the auditor, the attorney general, and perhaps others, either elected by the people or chosen by the legislature. Furthermore, many states have administrative officers whose terms overlap the term of the governor, and, in consequence, he has subordinates who are not of his appointment. Again, in making appointments, the governor is often limited by statutes which prescribe the qualifications the appointees shall possess. In the case of the appointment of important officials, the most common requirement is that the nomination shall be made by the governor and that confirmation shall be by the senate. The governor must name the "right" men or the senate will not confirm his appointments. He must consult party leaders to learn who the right men are, and sometimes this consultation amounts to dictation by a leader or boss. Even Theodore Roosevelt frankly confessed that as Governor of New York he had to consult Boss Platt with regard to his appointments or find them failing of confirmation in the senate. In other words, the appointing power is not infrequently in the hands of the man who stands behind the governor's chair rather than with the man who sits in it. Sometimes, of course, the governor is himself the party leader in the state, in which case his appointments may be of an independent character, although that does not necessarily mean that they are any better than those an invisible leader might prompt him to make. It seems that the more sordid type of politics is much more likely to enter into appointments by a governor than into those made by the President; for the state party organization is smaller and more unified than the national organization and therefore easier for small groups and bosses to control. We might add also that the citizen is often more interested in what is taking place at Washington than he is in what his local rulers are doing, a deplorable fact which the powers that be in a state know how to use to their advantage. Conditions in respect to the choice of administrative officers in the state might be improved by vesting their appointment solely with the governor; for it is in connection with securing the confirmation of the senate that the governor often finds that he must bow to the sinister power of the boss and the machine.

3. Removals. We have learned that the President has a very wide power of removal. It is not so with the governors, who may remove only under authority expressly conferred by law—an authority which the states are slow to confer, although there has been some development in that direction along with the tendency to increase the appointing power. The general rule now is that the governor may remove officers whom he appoints; but that those appointed by senatorial confirmation may be removed only upon the approval of the senate, a restriction in striking con-

trast to the President's independent power of removal. More extensive powers of removal are granted in Michigan, where the governor may even remove elected state officials when the legislature is not in session, and any elective county officer. In giving the governor the authority to remove local officers, usually law enforcement officers, Michigan is joined by New York, Minnesota, Wisconsin, and a few other states.⁵ In 1932 Governor Roosevelt removed from office Thomas M. Farley, Sheriff of New York County. It seems that he was about to remove Mayor Walker, but the Mayor's resignation stopped the proceedings.

4. Pardons and reprieves. The power to grant pardons and reprieves is held by the governor alone in some states; in others, a pardon may not be granted by the governor except upon the recommendation of a board of pardons; and in a third group of states, pardons are granted by a board of which the governor is simply a member. The power to grant pardons has been freely exercised by governors, and in some cases it has amounted to a scandal. Governor Davis of Kansas was tried, but acquitted, when his term of office expired in 1925, for accepting a bribe for a pardon. A Governor of Arkansas liberated about three hundred prisoners at one fell swoop, in order to call the attention of the public to the evils of the system of contracting prison labor. "Ma" Ferguson of Texas has the record, with nearly four thousand convicts turned loose on society during her two-year term (1925-27), a record which prompted Will Rogers to observe that her successor would have to start by catching his own prisoners. These wholesale abuses of the power should not be regarded as typical; but many governors have been too liberal in granting pardons, a condition which a number of states remedied by establishing pardon boards as mentioned above.

Other executive powers and duties. As the ceremonial head of the state, the governor is present at many important public gatherings, receives distinguished visitors, attends (a number of them do) the inauguration of the President, meets his fellow governors at conferences, and lends his name to numerous affairs and enterprises, public or private. Acting more definitely in an official capacity, he formally accepts the service of legal papers issued against the state, sends to and receives from governors of other states requisitions for persons alleged to be fugitives from justice, takes care of communications between the state and the national government, and performs other duties of a similar character. He is invariably the commander-in-chief of the state militia, except when it is in the service of the United States, when it is under the command of the President. The governor is empowered to call out the militia to suppress riots or prevent serious disorders. The state's chief executive is usually an *ex officio* member of a large number of boards and commissions, as is illustrated by twenty-four such memberships held by the Governor of Michi-

⁵ Fairlie and Kneier, *County Government and Administration* (1930), pp. 99-100.

gan in 1920. Many of the governor's duties, however, are petty and routine in character, consuming the major portion of his time and taking his attention from the really important problems awaiting solution. Former Governor Alfred E. Smith complained that about three fourths of his time was taken up with clerical or unimportant matters which should be disposed of by capable administrative assistants.⁶

III. THE GOVERNOR'S LEGISLATIVE POWERS ⁷

In the chapter immediately preceding, we stressed the extent and importance of the President's power and influence over legislation. We shall now do the same for the governor. However far behind the President the governor may lag in executive and administrative powers, it is a fact that in most states his authority in legislative matters compares very favorably with that of the President, and in some states he has a distinct advantage over the President. The governor's lack of executive power due to the disorganizing and disintegrating forces in state government around the middle of the last century did not serve him as a defense against the people who had elected him and who wanted promises performed. Consequently, governors turned their efforts to legislation as the most promising field for achievement, and in this field a number of them won notable success. As the advantages of legislative leadership and power in the hands of the governor became apparent, more authority was vested in him, until now, even in those states which have bolstered up his administrative powers, his opportunities in legislation are probably superior to those he finds in administration.

1. **General legislative powers.** In every state the governor may call the legislature into special session, and in a few states he must do so when petitioned by a specified number of the legislators. In about half the states he has an advantage over the lawmakers when they are in special session, in that they may not legislate upon matters other than those for which the session is called. A second legislative power of the governor is the authority to adjourn the two houses when they cannot agree upon a date for terminating their labors. This power is seldom used, because many states fix the length of legislative sessions by constitutional provision, and because in other states the houses are usually able to reach an agreement. More important than the power either to call special sessions of the legislature or to fix the date for its adjournment, is the governor's authority and duty to send it messages. Like the President's messages to Congress, the messages of the state's chief executive are sent regularly at

⁶ "How We Ruin Our Governors," *Nat. Municipal Rev.* (1921), X, 277-280.

⁷ Dodd, *op. cit.*, pp. 190-196; J. A. Fairlie, "The Veto Power of the State Governor," *Am. Pol. Sci. Rev.* (1917), XI, 473-493; Holcombe, *op. cit.*, pp. 115-119, 352-370; Mathews, *op. cit.*, pp. 289-302; Mathews and Berdahl, *Documents and Readings in American Government* (1940 ed.), Ch. XXII.

the beginning of a session of the legislature and at such other times as may seem desirable. The governor follows the federal model, reporting on the condition of the state and recommending needed legislation.⁸ On the average, his messages are as effective in securing desired legislative action as are the messages of the President—perhaps more so—for the state assembly is usually of short duration, its deliberations must be somewhat hurried, and the majority of its members are more likely to welcome than to resent the governor's efforts to help them.

2. The veto. Without any question, the most important power of the governor in relation to legislation is the veto power. North Carolina is the only state which has not authorized its use. When the legislature passes a bill, it is sent to the governor, who is allowed a few days, varying among the states from three to ten, in which to consider it. If he signs it, it becomes a law. If he allows the allotted days to pass without acting upon it, it still becomes a law. But if he vetoes the bill, it is returned to the legislature for further consideration. In some twenty states the veto may be overcome only by a two-thirds vote of the *total* membership of each house of the legislature, and in about a dozen states the veto may be overcome by a two-thirds vote of the members *present*. All other states, except Connecticut, require a larger vote than a simple majority of the members present to "override" the governor's veto. Originally, the governors who had the veto power used it sparingly and chiefly as a means of preventing unconstitutional legislation, as did our early Presidents. Nowadays, it is used practically without let or hindrance for any reason a governor may have in mind. At times the veto amounts to a slaughter, but it is usually a slaughter of defectives. Professor A. N. Holcombe gives us some interesting figures.⁹ In 1923 the Governor of New York vetoed 196 of 1,098 measures; California's Governor, 411 of 890; and governors of some other states also made high scores, although in a few states at the other end of the scale the bills meeting executive disfavor were relatively few in number. More important than the number of vetoes is the question of their effectiveness. Does the veto axe deal a death blow to a bill? Ordinarily it does. In 1923 the legislatures were able to override only about 9 per cent of the vetoes, and about four fifths of such overriding occurred in a few states in which the executive and legislative branches were decidedly out of harmony.¹⁰

THE POCKET VETO. We learned of the operation of the pocket veto when we discussed the President's part in national legislation. This same type of veto is permissible in some twenty states. If the legislature sends bills to the governor and then adjourns within the time allowed the gov-

⁸ H. Walker, "Governors' Messages, 1931," *Am. Pol. Sci. Rev.* (1931), XXV, 346-364, "The Results of Governors' Messages in 1931," *ibid.* (1932), XXVI, 77-84, and "Governors' Messages and the Legislative Product in 1932," *ibid.*, 1058-1075;

⁹ *Op. cit.*, p. 353.

¹⁰ *Ibid.*, p. 354.

error for the consideration of bills, the governor's nonaction in reference to such "eleventh-hour" bills serves as an absolute veto, the pocket veto. Many bills come to the governor near the end of the legislative session, so many that it is impossible for him to give them anything like careful consideration. After a cursory examination of these bills and hurried consultations with advisers, he takes some long chances and signs the bills it seems desirable to approve before the time limit has expired, leaving the other bills to painless death by the pocket veto. A large number of states prohibit the "pocket edition" of the veto, by providing that bills shall become a law unless actually vetoed by the governor within a stated period after the legislature has adjourned. This period varies in the several states from five to thirty days. Obviously, this plan places the governor in a position in which he can really weigh and consider the bills which are referred to him near the end of the legislative session. It, therefore, enormously increases his effectiveness as a legislator. At the same time it compels him to accept a definite responsibility for his vetoes, since the indirect veto is not permitted.¹¹

THE ITEM VETO. Thirty-nine states now give the governor the authority to veto separate items of an appropriation bill, and in a number of states he may also reduce such items. These powers, like the power to veto whole bills, are freely exercised. The item veto, especially when the right to reduce items is combined with it, gives the governor a broad and very useful negative in regard to appropriations¹²—a negative which legislators who for political reasons vote for extravagant appropriations often secretly hope he will exercise. This particular type of veto serves also as a most effective instrument against the mounting of "riders" on appropriation bills. While nearly all the states feel that they have gone far enough with the item veto when the governor is empowered to strike out or reduce parts of an appropriation bill, South Carolina and Washington authorize him to veto a part of any bill.

EXECUTIVE RECOMMENDATION OF AMENDMENTS. Three states—Alabama, Virginia, and Massachusetts—give the governor a choice between vetoing a bill and returning it to the legislature with proposed amendments. In the latter event, the legislature accepts or rejects the governor's proposal by a simple majority. In case of acceptance, the amended bill goes back to the governor, who very naturally signs it. If, on the other hand, the

¹¹ A few states follow a practice which is recommended by the National Municipal League; namely, that bills vetoed after the legislature has adjourned shall be filed, together with the governor's veto messages, with the secretary of state, who shall present them to the legislature at its next session for reconsideration in like manner as if they had been returned by the governor during the last session. Thus, the secretary of state for the Commonwealth of Washington in 1931 laid before the legislature 65 bills which had been vetoed by the governor after the close of the session of 1929. (*Spokesman-Review*, January 5, 1931.)

¹² R. H. Wells, "The Item Veto and State Budget Reform," *Am. Pol. Sci. Rev.* (1924), XVIII, 782-791.

governor's amendments are rejected, then the original bill goes back to him for his approval or veto. This plan of allowing the governor to suggest changes in a bill seems to make the occasions for the use of the veto much less frequent, and, to that extent at least, brings about a more harmonious relation between the executive and legislative branches of the state government. The same sort of plan may be used and is being used unofficially in other states. Legislators in touch with the governor will let his views be known on projected bills; or the governor may publicly speak his mind; or the legislature may, upon the governor's request or upon its own motion, recall a bill it has sent to him. Any one of these steps may lead to the incorporation of amendments which will make a bill acceptable to the chief executive.

IMPORTANCE OF THE VETO. Few will deny that the extension of the veto power has improved our state lawmaking systems. The power has been extensively, effectively, and, on the whole, wisely used. Governors have often prevented the enactment of bad legislation, and perhaps even more frequently they have blocked excesses in appropriations. Legislators themselves, unable to resist the pressure of powerful interests in their constituencies, not infrequently vote for an indefensible bill or item of appropriation and wait in confidence for the governor's veto. Thus, the legislator may save his head with his constituency while the governor serves the whole state and incurs the wrath of some of its citizens by beheading the legislator's measures. It is unfair to the governor, of course, to pass such tasks to him, but he can better afford to risk the hostility of voters in a particular locality than their delegate in the legislature can; for the governor's loss in one community may be made up for by gains in another. Formerly, long orations were made on the advantages of the bicameral legislative system, laying great stress upon the dogma that one house would kill the "bad" bills which emanated from the other. All too often the other chamber has failed to serve as executioner. It is the opinion of students of state government that in a number of states, including New York, the chief executive now "exerts a more powerful and beneficial check upon legislation adopted by both houses than either house does upon that adopted by the other."¹³ In those states in which he is given a few weeks' time to consider bills after the legislature has adjourned, he sits as a sort of third chamber. "He grants hearings to advocates and opponents of measures which have received legislative approval, refers legal and financial questions to his attorney general or other advisers, and in general does what he can to determine for himself whether the measures adopted by the legislature should be enacted."¹⁴ It would be absurd to make the governor out a hero, defending, in every instance, the interests

¹³ From A. N. Holcombe, *State Government in the U.S.* (1931 ed.), p. 336. By permission of the Macmillan Company, publishers.

¹⁴ From *ibid.*, p. 355. By permission of the Macmillan Company, publishers.

of the people against ignorant, careless, or corrupt legislators. Governors, as well as members of the legislative branches, have sometimes failed in their trust. It is true, however, that the governor and his advisers are ordinarily better qualified to pass upon bills than is the average legislator; and when we combine the governor's advantage with the fact that the eyes of the whole state are upon him, we have reason to expect that the affairs of the whole people will be better served by the governor than by individual legislators.

3. The governor and the budget. We are to consider the subject of government finance in a later chapter; but we must record here that the governor's part in relation to state revenues and appropriations has greatly increased in many states during the past twenty or thirty years. We noted above the governor's negative and older power over appropriations through the item veto. A number of states now authorize or require him to initiate the budget, that is, the financial program for the state for the ensuing fiscal period. The essence of the plan is that the governor, or officers responsible to him, collect information concerning the financial needs of the various government agencies and institutions of the state, decide how much should be appropriated for each, make an estimate of revenues to balance these appropriations, and submit the whole program to the legislature. The governor, who is actively working for the state all the time, who is in constant contact with its problems, and who bears the brunt of the responsibility for efficiency and economy, is the logical official to prepare the budget. The legislature may disregard his recommendations, but it at least has a financial program upon which to work; and if the program has public approval, the legislature will not lightly pass it by.

4. The governor's leadership in legislation. In considering the powers of the governor we must look beyond the constitutions and statutes, just as we did in the case of the President. As the highest officeholder in the state, the governor is quite likely to be a man of considerable influence in his party, and there are many examples of governors who have dominated the party organization. Sometimes the members of his party who are in the legislature will be glad to follow him; at other times they may follow him reluctantly under the dictates of political wisdom. Governor Wilson went before the Democrats in the New Jersey legislature and said: "I have been elected Governor of New Jersey by the people of New Jersey, selected by the convention of the Democratic party, and I thereby have become the responsible leader of the Democratic party in the State. I will be held responsible by the people at the polls. . . . Each of you gentlemen will be held responsible in the districts where you were elected. I am held responsible as well as you by the same people. I am the only person in the whole State, however, to express approval or disapproval on

behalf of all the people, and I will express that approval or disapproval by determining what we should do." ¹⁵

There was no denying this logic, and when Wilson immediately followed it by presenting a program (a thing which seldom emanates from a legislative group), the Democratic lawmakers adopted it unanimously. It may be said that a governor has at his disposal about the same means as the President for making his influence felt in legislative chambers. Like the President, he may establish close personal relationship with legislators, judiciously use the patronage in emergencies, use his influence as the official leader of his party, and win public opinion to his side by a skillful popular appeal.¹⁶

Perhaps he has an advantage over the President in that there is ordinarily less party politics in a state than in the nation, a condition which enables a popular governor to carry with him a large support from all parties. Another possible advantage is found in the fact that state legislatures are usually limited to short sessions and hence not only lack the time to harass a governor as Congress sometimes harasses the President, but may actually turn with some relief to a governor who has a program prepared for their guidance during the sixty days or so they sit in biennial session.

IV. OTHER STATE EXECUTIVE OFFICERS ¹⁷

A typical state constitution provides that "the executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, superintendent of public instruction, and attorney general," and that "the supreme executive power shall be vested in the governor." ¹⁸ In other words, while the governor is the most important executive officer, he does not hold all of the executive power. These other executive officers, like the governor, are usually elected by popular vote, although there are some cases in which they are elected by the legislature or appointed by the governor.

Lieutenant governor. About three fourths of the states have a lieutenant governor, who, as we have just said, succeeds to the governorship in case of the resignation, death, or impeachment of the governor, and in a number of states exercises the functions of governor during the temporary absence of that official from the state. Except in Massachusetts, he

¹⁵ Quoted in Ogg and Ray, *Introduction to American Government* (1942 ed.), p. 786, note, from David Lawrence in the *Springfield Republican*, Feb. 29, 1924.

¹⁶ The two last-named methods were employed by Governor Peay of Tennessee in 1927, when, in his annual message, he listed the party's campaign promises and told the legislature that the people looked to it to enact the pre-election pledges into law. (*Chattanooga Times*, Jan. 6, 1927.)

¹⁷ W. F. Dodd, *State Government* (1928 ed.), pp. 225-231; A. F. Macdonald, *American State Government and Administration* (1940 ed.), pp. 214-223.

¹⁸ Constitution of Illinois, Art. V.

presides over the senate. The office of lieutenant governor is generally considered unnecessary. Obviously, the senate would not object to choosing its own presiding officer; and it is more desirable to have as the governor's successor the secretary of state, or some other officer who is closely associated with the administrative affairs of the state.¹⁹

Secretary of state. All the states have a secretary of state. A few of his duties are prescribed by the constitution, but most of them are imposed by legislative acts. He keeps the records of the state, supervises elections, issues certificates of incorporation and motor vehicle licenses, and does other administrative work of a similar character. His duties are important, although often unrelated.

Attorney general. Another important officer is the attorney general, no state being without one. Like the secretary of state, his duties are mainly prescribed by statute. It is his duty to give legal advice to the governor and other administrative officers and agencies when requested to do so, to appear in court in all cases in which the state has an interest, and to institute proceedings against violators of state law where the general public is adversely affected. In a few states he has some authority to direct the work of the prosecuting attorneys in the counties.

Superintendent of public instruction. Either the constitution or a statute provides for a superintendent of public instruction in each state. His legal powers are not as a rule very comprehensive. In general, he has some authority to supervise the administration of schools in counties and other local districts, to apportion school funds among such districts, and to make various investigations. Regardless of his legal powers, a high-class superintendent will have a most important influence in shaping the state's educational policy.

Treasurer. A treasurer in every state receives the revenues and makes disbursements. He has little discretion beyond the authority to choose the banks in which the state funds shall be deposited, and often even this discretionary power is limited.

Auditor. The acts of the treasurer are checked by an auditor or comptroller, who is a more important financial officer than the treasurer. The auditor's chief duty is to see that the funds are being lawfully expended. A number of states have given the auditor the authority to require uniform methods of accounting in the administrative departments, and in some states he may exercise supervision over the accounts of local government agencies.²⁰

While the foregoing paragraphs include the more important executive officers of the state, there are many other officers, boards, and commissions

¹⁹ See W. R. Isom, "The Office of Lieutenant Governor in the States," *Am. Pol. Sci. Rev.*, XXXII, 921 (October, 1938).

²⁰ Dodd, *op. cit.*, pp. 228-229.

which have an important part in administering the state's functions. They have been created, usually by statute, during the past fifty or sixty years to deal with the newer social and economic conditions. There are commissioners of banking and insurance, public utilities commissions, factory inspectors, and what not. We shall give more attention to these agencies when we take up the problem of administration; but we must at least note their existence here and, more important for present purposes, emphasize the fact that although the governor is called "the supreme executive," he usually has only a very limited control over such agencies.

The executive power in the Model Constitution. For more than a score of years, the National Municipal League has had a Committee on State Government which from time to time has published a Model State Constitution.²¹ It is worth our while to notice briefly what the latest edition (1941) of this "Constitution" proposes on the executive department. It would make the governor the chief executive in fact as well as in name, and would establish closer and more formal relations between him and the legislature in such ways as to strengthen his leadership as a law-maker. The Model draft states that "the executive power of the state shall be vested in the governor," and it does not then proceed to parcel out executive power among other officers as do many state constitutions. It relegates to the scrap heap of "Model T" political institutions the independent executive departments with which we have too long been familiar. The Model would authorize the governor to appoint an administrative manager, to serve at the governor's pleasure, and to perform such duties as the chief executive might delegate to him. Administrative departments, not exceeding twenty, may be created by act of the legislature. Heads of departments are to be appointed and removed by the governor.

The governor, the administrative manager, and the heads of departments may sit in the legislature, introduce bills, and participate in the discussion of measures, but they are given no vote. The governor is authorized to order a referendum on any bill which fails to pass the legislature, and that body may, by majority vote, order a referendum on any measure vetoed by the governor and failing to receive the two-thirds majority in the legislature necessary to override such veto. The experts' plan gives the governor wide powers over state finance. He is required to prepare and submit to the legislature the budget, together with revenue and appropriation bills. And he is authorized to veto separate items of appropriation bills or to reduce such items. These provisions are included in the Model plan after years of careful consideration, and they are worthy of the attention of students of government and of responsible legislators and officials in the several states.

²¹ W. B. Graves, "Fourth Edition of the Model State Constitution," *Am. Pol. Sci. Rev.*, XXXV, 916 (Oct., 1941).

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Congress: Its Structure and Organization



It is now our purpose to study the legislative branch of government—that branch which is primarily concerned with lawmaking and in which there exists the greatest opportunity for popular control. We shall examine the structure, organization, procedure, and powers of Congress; review state legislatures in a similar manner; and give some attention to direct legislation in the score or more states in which it is authorized. This chapter deals exclusively with the structure and organization of Congress.

I. THE BICAMERAL SYSTEM

Since mediæval times the English Parliament has been composed of two houses, Lords and Commons. Naturally, most of the American colonies followed the English model when they set up their legislative bodies; and when these colonies became states, only three of them, and they only temporarily, failed to adopt the bicameral principle. Of course, in deciding for two chambers, the members of the Philadelphia Convention were strongly influenced by the examples from English and American history and by the reputed advantage that one house “checks” the other. But there was a much more practical consideration. A bicameral Congress made possible a very important compromise on representation—a compromise which gave the states representation in proportion to population in one chamber and equal representation in the other. The adoption of the bicameral plan, with the accompanying compromise on representation, saved the Convention from disaster and made the Constitution acceptable to the country. These facts alone were ample justification for the bicameral system; but it has been further justified in practice by the added consideration it brings to legislative measures and by the different character of representation in the two houses. Whatever may be said against the bicameral principle in the states and cities, it must be said that, with respect to Congress, its origin was natural and its services are practical.

II. ELECTION AND QUALIFICATIONS OF REPRESENTATIVES ¹

The popular body. The House of Representatives, commonly called the "House," is the "popular" branch of Congress. The Constitution provides that every person who shall have the right to vote for members of the most numerous branch of the state legislature shall have the right to vote for members of the House of Representatives. Since nearly all of the states had adopted, even before 1789, a very democratic suffrage for the election of members of the lower houses of their legislatures, the members of the lower House of Congress from the very beginning have been chosen by a democratic electorate. But the Senate is now chosen by the same electorate, so that if we are to maintain that the House is still *the* popular body we must do so on grounds other than that its members are elected by a universal suffrage. These other grounds are that the short term of two years makes its members responsive to the people; that it represents the people of the states in proportion to their numbers; and that somehow it has come to personify many, if not all, of the American qualities. The average representative is no better and no worse than the average business man, the average farmer, the average lawyer, the *average American*.

Apportionment of representatives. The Fourteenth Amendment requires that "representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." The original provision of the Constitution relating to apportionment stated that the slave population should be counted at only three fifths of its actual number; but this provision of course became inoperative with the abolition of slavery, and the Negro became a whole man by the terms of the Fourteenth Amendment. The Amendment further provides that any state which denies the right of suffrage to any of its male citizens twenty-one years of age, shall have its representation in Congress "reduced in the proportion which the number of such citizens shall bear to the whole number of male citizens twenty-one years of age in such state." This represented an attempt to force the Southern states to give the Negro a vote. Although many Negroes in the South have been deprived of the right to vote by one means or another, the penalty has never been enforced. An attempt to enforce it would stir up the bitterest struggle below the Mason-Dixon line; and, besides, it would be extremely difficult, if not impossible, to determine how many persons a state had deprived of the right to vote. Furthermore, if the penalty were to be applied, it would have to be applied against those states which in good faith require voters to pass a

¹ D. S. Alexander, *History and Procedure of the House of Representatives* (1916), Ch. I; R. Luce, *Legislative Assemblies* (1924), Chs. V-VI, X-XII, XIV-XVI; Mathews and Berdahl, *Documents and Readings in American Government* (1940 ed.), Ch. XII.

literacy test, as well as against those which deprive persons of the franchise by subterfuge. Finally, the Woman Suffrage Amendment has rendered obsolete the penalty provision of the Fourteenth Amendment, since that provision applies only if male citizens are denied the right to vote. Since the penalty of reduction in representation for a denial of the suffrage remains a dead letter, each state has representation in the House according to population (not according to the number of citizens or voters), excluding Indians not taxed.

REAPPORTIONMENT. Shifts in population will inevitably occur; so that periodic reapportionments are necessary, if the states are to have their fair share of representatives. The Constitution calls for a reapportionment after each decennial census. It must be said that Congress has not always hastened to carry out this constitutional mandate. Indeed, being unable to reach a satisfactory agreement concerning the number of representatives and the exact method of apportioning them among the states, Congress made no reapportionment on the basis of the census of 1920. Failure to do so was, of course, contrary to the express provision of the Constitution; but nothing could be done about it, since there is no legal action which may be taken against Congress.

NUMBER OF REPRESENTATIVES. The Constitution provides that the number of representatives shall not exceed one for every thirty thousand inhabitants, but that each state shall have at least one representative. The Constitution fixed the number of representatives at 65 until the first census should be taken. After the census of 1790, Congress fixed the number at 103; and that body has increased the number following nearly every decennial census. Although the present membership of 435 is only about a tenth of the maximum number authorized by the Constitution, it is generally considered too high for the most satisfactory working of a legislative body. The explanation of the almost constant increase in the number of representatives is quite simple. The rapid increase in the population and the admission of new states accounted for a part of the increase. But the main reason was that the population of the several states did not grow in the same proportion. This meant that, when Congress made a reapportionment, it either had to reduce the representation of the more slowly developing states or give the more rapidly developing states additional representatives. Since the states were naturally reluctant to see their representation decreased and since representatives were still more reluctant to vote themselves out of seats in the House, Congress usually, though not always, made the adjustment by increasing the number of seats for the rapidly developing states while leaving the representation of the other states unchanged.

THE PRESENT REAPPORTIONMENT LAW. The decennial problem of reapportionment, with the accompanying temptation to increase the number of representatives with each reapportionment, seems to be solved by an

act of 1929. This act heroically limits the membership to 435, "permanently." This limitation was made possible by the only means available, namely, by reducing the number of seats of the slow growing states and increasing the number for the other states. Thus, in 1932, twenty-one states lost the seats which eleven states gained. Missouri lost the greatest number—three; California gained the greatest number—nine. In addition to placing the total number of seats on a permanent basis, the act provides for automatic reapportionment. Following each decennial census, the Department of Commerce submits figures showing the changes in population since the last census and the proportion of the 435 representatives to which each state is entitled as a result of those changes. Congress may then act upon this information; but if it does not, the seats are automatically reapportioned according to the method of distribution Congress employed for the last reapportionment.

CONGRESSIONAL DISTRICTS. The Constitution does not lay down any rule with regard to districts. It provides only that "the times, places, and manner of holding elections shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations." For about half a century, Congress allowed the states to determine how the representatives should be chosen. Some states established districts and had the voters of each district elect a representative; others employed the general ticket plan, by which each voter in the state cast his ballot for the number of representatives to which the state was entitled. The general ticket system contains a grave injustice, in that the party with a plurality of votes, however slight, will win all of the representatives in the state.

To correct this evil, Congress passed a law in 1843 establishing the district plan. By later legislation, the states were authorized to elect at large (on a general ticket) any additional members they may have won in a reapportionment, and, in the event of a reduction in representation by reapportionment, to abolish the districts and elect all of their representatives on a general ticket. While a few states have availed themselves of one or the other of these privileges, the district system is very generally employed. This plan operates with more fairness for a minority party than the general ticket plan, in that such party may carry one or two districts of a state which as a whole gives the other parties large majorities. But the minority voters in all districts are still, in a sense, unrepresented. For example, in a district which gives 39 per cent of its votes to a Republican, 36 per cent to a Democrat, and 25 per cent to a Socialist, the Republican is elected. It is true that the advantage a party has by virtue of a plurality in one district may be offset by a similar advantage another party has in another district, but such advantages fall to the contending parties only in rough proportions:

The gerrymander. Pursuant to authority granted by Congress, the

state legislatures lay out the congressional districts. Prior to 1929 congressional reapportionment acts commonly contained an ineffective requirement that districts should be composed of "contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants." The party which happens to hold the majority in the legislature at the time of reapportionment has often yielded to the temptation to district the state in such a way as to give it an unfair advantage over the opposing party. If a state's vote is normally, let us say, 55 per cent Democratic, a legislature in which that party has the majority might devise a set of geographical curiosities in such a way that all the districts of the state will go Democratic. Or, if the mechanicians are afraid to risk the attempt to put every district in the Democratic column, they may so change the map as to put as many Republicans as possible in one or two districts, leaving the others safe for Democracy. Some districts have resembled shoe strings, others saddlebags, still others dumb-bells.² In 1811 that master political cartographer, Elbridge Gerry, carved out a Massachusetts district which left his political enemies, the Federalists, no chance of winning. "That district looks like a salamander," said a complaining Federalist. "Say rather a Gerrymander," cried another, giving the practice the name by which it has ever since been known. In our time the hand of the gerrymanderers is stayed somewhat by public opinion, but now and then the "fixers" remake the political map. In 1940 there were enough labor votes scattered among three Congressional districts around Pittsburgh to elect Democratic congressmen from all three districts. In 1943 the Republican legislature of Pennsylvania "neatly amputated these Democratic areas, added them superfluously to the safely Democratic Pittsburgh district." The legislature performed similar operations on districts in Philadelphia. "Democrats moaned in the immemorial anguish of the gerrymandered. Cried they: 'Steal,' 'dastardly,' 'foul blow.' Replied Governor Martin: 'It's just the good old American way. When we Republicans were in the minority, we bellyached when they ran over us. It just has to be done.'"³ Some plan of proportional representation, to be discussed in the chapter on state legislatures, could be adopted which would do away with the gerrymander and other evils of the district system; but our politicians are almost unanimous in approving the present plan, and the voters seem to agree with Governor Martin that the district system, gerrymander and all, is just the "good old American way."

The regulation of congressional elections. As Congress originally left the states to determine whether they should employ the district or the general ticket system for choosing representatives, so it left them the

² Another unfair feature in reapportionment is the frequent variation in the size of the districts. Each should contain about 300,000 inhabitants, but urban districts are often given approximately twice that number and rural districts a number much smaller than the quota. This, of course, is a discrimination against urban areas.

³ *Time*, May 24, 1943, p. 17.

authority to determine other matters relating to elections, such as the date and the method of voting. About seventy years ago, however, Congress passed a law requiring the secret ballot for the election of all representatives, and established the Tuesday following the first Monday in November as the election day.⁴ Other acts of Congress relating to the election of members include the Corrupt Practices Acts and a measure designed to protect (Negro) citizens in their right to vote. For some years it was supposed that the authority of Congress over elections did not include primary elections. At least that seems to have been the conclusion of the Supreme Court in the *Newberry* case.⁵ Recently, however, the Court held that a commissioner of elections in New Orleans, who altered and falsely counted ballots cast in a congressional *primary* election, was guilty of violating a provision of the Criminal Code of the United States which prescribes punishment for anyone "who under color of any law . . . or custom, wilfully" deprives any citizen of rights secured to him by the Constitution and laws of the United States. As noted above, persons who have the right to vote for members of the lower house of the state legislature are given the right by the Federal Constitution to vote for members of the lower House of Congress. This right to vote in such elections is incomplete, says the Court, in effect, unless it is extended to cover the right to vote in primary elections.⁶ It seems, then, that Congress may now enact legislation dealing specifically with congressional primaries.

The two-year term. The short term of office was the fashion when our Constitution was framed, and the more democratic element in the country complained that the two-year term for representatives was too long; that the people's liberties were in danger unless representatives were chosen annually—the practice commonly followed at that time in electing members of the lower house of state legislatures. We now regard the two-year term as too short. The disadvantage of the short term is not so serious, however, when we consider that representatives are usually re-elected several times. In 1929 members of the House had served, on the average, 8.45 years. At the same time the senators, in spite of their six-year term, held an average of only 8.04 years.⁷

The old "lame duck" sessions. The term of office is short; but the interval between the election and the time those elected took their seats was, until 1933, ridiculously and inexcusably long—thirteen months, from November of the even year to December of the odd year, unless a special session of Congress was called. But that was not all. After we had elected all of our representatives and a third of our senators in Novem-

⁴ Maine is excepted from this requirement and holds her congressional election in September.

⁵ *Newberry v. United States*, 256 U.S. 232 (1921).

⁶ *United States v. Classic*, 313 U.S. 299 (1940). See also R. E. Cushman, "Constitutional Law in 1940-1941," *Am. Pol. Sci. Rev.*, XXXVI, 269 (April, 1942).

⁷ *New York Times*, May 26, 1929.

ber, the old Congress solemnly met in December, just as if nothing had happened, and for three months voted our appropriations, made our laws, and conducted our investigations. This session of Congress was commonly called the "lame duck" session because so many casualties of the November election participated in its work. Many a good citizen said, without laughing, that the newly elected congressmen needed the thirteen months to get ready for their legislative duties. This was next to nonsense; for the new members, who ordinarily constitute about a fourth of the membership, quite generally, and we may add, quite naturally, busied themselves with other affairs until they took their seats.

THE TWENTIETH AMENDMENT. The absurd argument to the effect that congressmen should have thirteen months in which to get ready for their first session seemed to have almost incredible vitality. But finally, in 1932, Congress passed a resolution to abolish the "lame duck" session and convene on January 3 the Congress elected in November. This Amendment was ratified by the thirty-sixth state legislature in January, 1933.

Qualifications of members. According to the Constitution, any person who has attained the age of twenty-five years, who has been for seven years a citizen of the United States, and who is an inhabitant of the state which elects him, is eligible for a seat in the House.⁸ Another clause of the Constitution provides, however, that no person holding any office under the United States shall be a member of either House of Congress.⁹ Thus, officers of the Army and Navy and civil officers from the President on down are excluded from membership. In the matter of residence, politics and public opinion have added an additional requirement; namely, that the representative shall reside in the district by which he is elected, not simply in the state as is required by the Constitution. A few exceptions to this practice have been permitted only in metropolitan areas, where the representative may live quite close to his constituents although in a different district. We can hardly imagine a constituency in up-state New York electing a resident of New York City to the House, or a southern California constituency choosing a representative from the San Francisco Bay region. This district inhabitancy requirement may have unfortunate results. Suppose a party has no good candidate in a district; it must nevertheless put up one of the locals and be content. Or, suppose an exceptionally good man has no chance of winning in a district in which he resides; he is cut off from any chance to serve his country in the House. In England, a constituency in one corner of the country may send a man who resides in another to the House of Commons. The lack of emphasis

⁸ Art. I, sec. 2, cl. 2.

⁹ Art. I, sec. 6, cl. 2. Section 3 of the Fourteenth Amendment, designed to keep "rebels" out of Congress, excludes from membership persons who have taken an oath to uphold the Constitution and later engaged in rebellion against the United States. It was provided, however, that Congress might remove this disability.

on district representation is held to account in part for the broader view the average member of the House of Commons takes of national questions. Our representatives, whether they like it or not, must sometimes put aside national questions and think a great deal of the selfish desires of their constituencies, or their constituencies will forget them in the next election.

ADDITIONAL QUALIFICATIONS IMPOSED BY THE HOUSE. One might suppose that any person elected to the House who has the qualifications of age, citizenship, and residence in the state electing him, and who holds no office under the United States and who has not engaged in rebellion against the same, is entitled to a seat; for the Constitution names no other qualifications for membership. But the Constitution states that each House of Congress "shall be the judge of the elections, returns, and qualifications of its own members."¹⁰ This means that the representatives may hear and settle disputes as to who was actually elected in a particular district, and see that no person is seated who does not meet the constitutional qualifications. Now, in passing upon the qualifications of persons duly elected, the House has on several occasions added qualifications of its own, and in so doing it may have exceeded its powers under the Constitution. In 1900 it refused to seat Brigham H. Roberts, a polygamist elected by a Utah constituency. Victor L. Berger, famous Milwaukee Socialist, was elected to Congress in 1918; the House denied him his seat, on the grounds of his conviction on charges of sedition (of which charges the Supreme Court of the United States later cleared Berger), and more particularly for his "un-American" conduct during the war. The Constitution does not state that in order to be eligible for membership in the House one must have only one wife, or that one must share the patriotic sentiments of the majority of the representatives. Yet, in effect, these qualifications were respectively imposed by the House in the Roberts and Berger cases. Representatives insist that they may thus broadly interpret the term "qualifications," while some publicists are equally insistent that such denials of seats to duly elected individuals strike at the very heart of representative government; that the House, in effect, disfranchised the voters who elected these men.¹¹

Expulsion a better remedy. Authorities are generally agreed that individuals whose delinquencies are such as to make them unworthy members of either House of Congress should be seated and then expelled. Although the difference between the refusal of a seat and expulsion might not seem important to the person directly concerned, there are, in fact, two important differences. A seat may be withheld by a majority vote, while a two-thirds majority is required to expel a member. The more important difference is that the Constitution, in stating the qualifications

¹⁰ Art. I, sec. 5, cl. 1.

¹¹ Z. Chafee, *Free Speech in the United States* (1941 ed.), pp. 247 ff.

of members, thereby limits the authority to deny seats to cases in which congressmen-elect do not meet the qualifications; while it attaches no strings to the right of expulsion, and thus gives either House full power to expel a member for any reason whatsoever. It goes without saying that this power should be used only in the most extreme cases.

III. ELECTION AND QUALIFICATIONS OF SENATORS ¹²

Equal representation of the states. The Constitution gives each state two senators, with a sort of moral guaranty that "no state, without its consent, shall be deprived of its equal suffrage in the Senate."¹³ All the men, women, and children in Nevada could be accommodated in any one of our larger football stadiums; yet, through their two senators, they have equal suffrage in the upper House of Congress with the teeming millions of New York. Senators from a majority of the 48 states, representing much less than half the country's inhabitants, might very easily block the efforts of the minority of the senators whose constituencies include a large majority of our population. But, contrary to the opinion entertained by a number of the framers of the Constitution, the battles in the Senate never have been joined between those who represent large populations and those who represent the small or sparsely settled states. As everyone with an elementary knowledge of American history knows, the great issues have been between the agricultural and industrial states. As a group, however, the agricultural states do have some advantage, since they are more numerous and usually less populous than the industrial states. Of course, it may be fairly observed that the industrial states have the advantage in their number of representatives in the House.

A CHANGE IN REPRESENTATION UNLIKELY. Still, voices are sometimes raised in favor of modifying the system of representation in the Senate. In all probability such voices are futilely raised; for one can hardly imagine that any state would give up its "equal suffrage in the Senate." To be sure, the pledge of equal suffrage might be removed from the Constitution by an amendment; but it is inconceivable that three fourths of the states would ratify such an amendment. Perhaps that is fortunate; for any change in representation in the Senate would undoubtedly increase the membership of that body. The House has too many members now for the most effective work, and there is every reason to believe that the Senate's usefulness would be impaired by a weight of numbers.

Election of senators: THE OLD METHOD. The framers of the Constitution finally decided that senators should be chosen by the state legislatures, and this method of choice was employed until popular election

¹² G. H. Haynes, *The Senate of the United States* (1938), Vol. I, Chs. III-IV and Vol. II, Ch. XVI; Luce, *op. cit.*, Chs. III-IV; L. Rogers, *The American Senate* (1926), Chs. II, IV.

¹³ Art. V.

was substituted for it by constitutional amendment in 1913. The legislatures made their selections in whatever manner suited their convenience until 1866, when Congress, exercising its constitutional power to regulate the time and manner of holding senatorial elections, laid down the rules for these electoral bodies to follow. The two houses were required to meet separately and ballot for a senator on the second Tuesday after the legislature convened. If a candidate received a majority vote in each house, he was elected. If no candidate received such majorities, then the two houses, according to law, met in joint session the next day for the purpose of electing a senator. If no candidate received a majority vote in this session, the two houses continued to take at least one vote in joint assembly every day thereafter until some candidate received a majority. Election by state legislatures, even under this national regulation, did not prove satisfactory. It was argued that the corrupt influences of bosses and corporations too often controlled the votes in the legislatures; that men of wealth sometimes indirectly, and occasionally directly, bought their way into the United States Senate; that, when a senator was to be chosen, members of the state legislature were elected on their pledge to support this or that senatorial candidate, rather than in consideration of their stand on state policies—properly the primary concern of the legislature; that the not infrequent deadlocks in choosing a senator took valuable time which the legislature needed for the state's business, and intensified the partisan spirit which was almost invariably present during any senatorial contest; and that the choice of United States senators by legislatures was undemocratic. It was exceedingly difficult to refute any of these charges; but many able men said that the evils of selection by legislatures were exaggerated and that popular election would bring results of a much more deplorable nature.

THE MOVEMENT FOR POPULAR ELECTION. The movement for popular election of senators was started long before the Civil War, and the demand for this reform became insistent during the 'eighties. The Populist party urged the change in 1892 and thereafter; the Democrats accepted it as one of their principles in 1900; and in 1908 Mr. Taft approved it as a presidential candidate. As far back as 1893, the House of Representatives had approved a resolution for a constitutional amendment which would bring direct election of senators; but the Senate withheld approval in this matter, just as the House, until 1932, acted adversely upon the Senate's resolution for an amendment which would abolish the "lame duck" sessions of Congress. But the states interested in direct election of senators did not wait for a constitutional amendment. Particularly in the Middle West and in the West, the states adopted the plan of allowing the voters to express their choice for the Senate. The legislators, under a politico-moral obligation very similar to that of the presidential electors, then legally elected the candidate who had received the

largest number of popular votes. In the face of this movement, both Houses of Congress approved the Seventeenth Amendment, which was promptly ratified by the requisite number of states, and proclaimed in force (1913).

Is popular election an improvement? By the Seventeenth Amendment all persons qualified to vote for members of the lower house of a state legislature are declared to be entitled to vote for United States senator. In the thirty years following the adoption of this Amendment, the people have shown great interest in electing their senators. Has the popular election of senators removed the evils complained of under the old system? Certainly the state legislatures are freed of a function which often took a great deal of their time and energy and sometimes subjected them to the gravest criticism.

On other points we speak with less assurance. The fact that senators are usually nominated in direct primaries and elected by the people¹⁴ (except in case of a vacancy) does not remove the boss or the machine from the picture, although they may find it a little more difficult to pull their wires.

Money is still spent for the toga. In fact, more money is being spent now than before 1913. One can easily understand how the legitimate expenditure entailed in reaching a few hundred thousand voters in a senatorial campaign may run to \$40,000 or \$50,000. Much larger sums have been spent in several campaigns, leaving the general public under the impression that, in spite of popular election, it is still far easier for a rich man to enter the United States Senate than it is for a camel to pass through the eye of a needle.

Do we get better senators since the adoption of the Seventeenth Amendment? Few will deny that several demagogues have been sent to the Senate as a mark of popular favor. Perhaps we have traded some of the state-boss type of senators, which legislatures not infrequently delighted to honor, for a few of the demagogue variety; but we must await further evidence before reaching a conclusion. It cannot be maintained that popular election has deterred able men from becoming senatorial candidates, or that the people are more likely to pass them by than were the legislatures. We must remember that Lincoln failed to get a seat in the Senate long before the Seventeenth Amendment was adopted. On the whole, it must be said that the Senate is about what it used to be. If it is not now the House of Webster and Calhoun, neither was it such a body during the greater part of the long period in which our elder statesmen were chosen by legislatures.

¹⁴ The Amendment provides that vacancies which may happen in the representation of any state in the Senate shall be filled in an election called by the governor; or, that the state legislature may authorize the governor to make temporary appointments until the people fill the vacancies by election, as the legislature may direct. Legislatures have very generally empowered the governors to fill vacancies by appointment.

The Senate a continuous body. We recall that members of the House are elected for only two years and that every seat must be filled by election in the even year. Senators are chosen for six years, and, since one third of them complete their term biennially, only one third of the seats in the Senate are filled in each Congressional election. The Senate is thus a continuous body; for two thirds of its members are always "hold-overs." The House of Representatives must be reorganized after each election; but the Senate has been in organized existence since 1789. Some autumnal political revolution might completely alter the complexion of the House; but nothing less than three such revolutions, occurring at two-year intervals, could do the like for the Senate. There is little doubt that the six-year term and the provision for continuity have been important factors in making the Senate a more stable and consistent body than the House.

Qualifications of senators. The Constitution specifies that "no person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen."¹⁵ Persons holding any other office under the United States are ineligible for the Senate, as well as for the House. It is held, however, that members of commissions of investigation, delegates authorized to negotiate treaties, and persons acting in similar capacities are not officers of the United States within the meaning of the last-mentioned inhibition. Thus, Senators Joseph T. Robinson and David A. Reed served as delegates at the London Conference on the Limitation of Armaments, in 1930, without thereby losing their places in the Senate. Somewhat as the House, the Senate has at times been tempted, in the exercise of its power to judge of the qualifications of its members, to impose qualifications in addition to those enumerated in the Constitution. Considering the important place Senator Smoot later held in the upper chamber, it is interesting to recall that, when he was first elected to that body, there was a movement to refuse him a seat because of his position in the Mormon hierarchy. Wiser counsel prevailed, however, and Smoot was seated.

Excessive campaign expenditures may disqualify members-elect. Quite apart from the Corrupt Practices Act of 1925, which applies only to elections,¹⁶ and for violations of which a candidate may be legally prosecuted, the Senate insists that candidates shall not spend "too much" money in the primaries. Occasionally, very large sums have been spent. In 1918 Truman H. Newberry of Michigan spent at least \$195,000 in the senatorial primary, although the Michigan law then in force authorized an expenditure of only \$1,875. We noted above that Newberry's conviction was set aside by the Supreme Court of the United States. But the Senate, when

¹⁵ Art. I, sec. 3, cl. 3.

¹⁶ See Ch. 9, sec. VII.

it finally seated Newberry in 1922, gave ominous warning of what other heavy spenders might expect. The resolution reads in part: "That whether the amount expended in the primary was \$195,000, as was fully reported or openly acknowledged, or whether there were some few thousand dollars in excess, the amount expended was in either case too large, much larger than ought to have been expended." After the congressional election of 1922, in which a number of senators who had supported his claim to a seat were defeated, Newberry resigned, probably anticipating expulsion. Amounts spent by or on behalf of Frank L. Smith¹⁷ of Illinois and William S. Vare of Pennsylvania, particularly the latter, in the primaries of 1926, caused the cynic to say that the price of nominations to the Senate had skyrocketed since Newberry's sad experience. Following their nomination, these men were duly elected to the Senate; but that body, on the grounds of the staggering sums expended and the sources from which the money came, refused to seat them.

The Senate says, in effect, to candidates: "Watch the sources of your revenue and the amount you spend, or we may not give you a place with us." A sort of vigilance committee of the Senate anxiously scrutinizes the receipts and disbursements of candidates, and the whole body of senators closes the door on those who are presumably the worst offenders. In voting for such exclusions, the Senate is exercising, rather freely, its power to "judge of the elections" of its members. It is rather hard on the candidates; for no one knows just what sort of campaign finance the Senate will consider illegitimate. It seems that candidates are expected to follow a somewhat indefinite "rule of reason" and hope for the best. Lest a distorted picture of the expenditures of senatorial candidates in primaries be given, it should be emphasized that the large expenditures are the exceptions.

The personnel of Congress. Having in this and the preceding section followed congressmen up to the point where they are ready to take their seats in the House or Senate, we need now to consider who they are, their background, whom they represent. There is a turn-over of individual congressmen from one session to another ranging from one-fifth to one-fourth, but the type of personnel, although it may change considerably over a long period of time or as a result of a national crisis, probably does not change much from one Congress to another. Professor Madge M. McKinney has made an interesting study of the personnel of the Seventy-seventh Congress (January 3, 1941 to January 3, 1943), and a brief summary of her findings is here made.¹⁸ Half of the members of the House were fifty years of age or over; half of the senators, fifty-seven or over. The personnel was certainly not youthful, although the members

¹⁷ In the case of Smith, the evil was more in his official relation to his chief contributor, Samuel Insull, than in the amount actually expended in the primary.

¹⁸ *Am. Pol. Sci. Rev.*, XXXVI, 67 (February, 1942).

cannot be characterized as "531 old men—and women." Nearly all of them were born in this country, most of them in the districts and states they represent, and their sentiments and loyalties are deeply rooted in those areas. Practically all of them had some religious affiliation, with Catholics, Methodists, Presbyterians, Baptists, and Episcopalians dominating in the order named. Up to this point, notes Professor McKinney, they represented the American public in relatively fair proportions. They moved away, and very properly so, from this proportion in the matter of education, 88 per cent having attended college or professional schools, or both. On the score of political experience, the figures show that 156 had served in state legislatures, 109 as prosecuting attorneys, 50 as judges, and scores in various other offices. In the Senate sat 28 former members of the House and 16 former governors of states. The House claimed only two governors and one former senator. What were the former occupations of the members of this Congress? Insurance, publishing, real estate, lumbering and construction, merchandizing, selling, and manufacturing all had small representation. Forty-one members had been newspaper men, 59 farmers, and 87 teachers. Few of the "teachers," however, had laid down their books to enter Congress. The great majority who indicated teaching as a former profession meant only that they had once taught (until they could find something better—probably get started in the practice of law).

The great majority of congressmen (311 of the 531, or about 60 per cent, in the Seventy-seventh Congress) came from the legal profession. How is this explained? A number of explanations may be given. The lawyer's business, like that of the preacher and the teacher, is a "talking business," and, unlike that of most preachers and teachers, it brings him into frequent and fighting contact with public questions. More significant, the lawyer, even yet, often works for himself, and this makes it possible for him to take time out to run for public office. Still more significant, he can continue to practice law while holding his seat in Congress, and a number of the lawyers in both House and Senate do just that. In fact, it has been observed that some lawyer-congressmen have had much more lucrative practices than they ever enjoyed before they were chosen to represent the people's interest in Washington, D.C. Let it be recorded, however, that some of the ablest lawyer-congressmen have refused to have any client other than the people of the United States. The late Senator William E. Borah was the outstanding example of the latter type.¹⁹ There is another reason for the preponderance of lawyers in Congress. It is that the average ignorant person sees perfect logic in sending "lawyers to make the laws." Without a doubt, lawyers are most helpful, perhaps indispensable, for certain aspects of legislation; but to entertain the belief that

¹⁹ See C. O. Johnson, *Borah of Idaho* (1936), pp. 91-93 for that senator's views on the subject.

broad economic and social problems can best be decided by lawyers and lawyers alone is an absurdity. Legislation touches the interests of the entire nation, and its intelligent formulation requires the best minds of every profession, trade, and calling.

If lawyers, business men, and farmers, who come from the conservative and privileged classes, hold practically all of the seats in Congress, who at the Capitol represents the teeming millions of sweating Americans? The answer is that they are not represented except to the extent that they are served by the lawyers, the business men, and the farmers. It must be admitted that some, perhaps many, of these congressmen have faithfully represented all classes and conditions of men, and it is also permissible to observe that the "toiling masses" have had a great deal to do with choosing the entire personnel of Congress. Here we may have a good illustration of the absence of class consciousness in America: the fact that tens of millions, presumably in one class, are relatively content to have themselves represented by men and women selected from the millions of a supposedly different class.

IV. COMPENSATION AND PRIVILEGES OF CONGRESSMEN ²⁰

Compensation and allowances. The Constitution stipulates that senators and representatives shall receive a compensation for their services, the amount to be fixed by law. Congressmen decide what they are worth, and pass a salary law accordingly. If they want an increase in salary, they have only to consult themselves. What is to prevent them from voting themselves "fat" salaries? The answer is fairly obvious—public opinion would not permit it. The "salary grab" of 1873 ²¹ and its sequel of empty seats is still a familiar story in American history, and those who have never looked inside of a book know the story of the enactment and speedy repeal, under public pressure, of the Annuity Act of 1942. ²² The First Congress fixed the compensation at six dollars for each day's attendance, and in 1818 the amount was increased to eight dollars per day. The salary of \$3,000 paid after 1855 was increased to \$5,000 in 1865, to \$7,500 in 1907 (temporarily to this amount in 1873), and to \$10,000 in 1925. ²³ The Speaker of the House, the Vice President, and the President of the Senate *pro tempore* (when there is no Vice President) receives a salary of \$15,000. ²⁴ Congressmen also receive an allowance of twenty cents per

²⁰ Alexander, *op. cit.*, Chs. VIII–IX; Luce, *op. cit.*, Chs. XIII, XX–XXIII, XXV.

²¹ At the end of the term Congress increased the salary from \$5,000 to \$7,500 and made the increase retroacting for the term.

²² This pension on annuity plan was part of a general annuity system. It was not pernicious, but it was ill-timed.

²³ Also, widows of deceased members are invariably voted a sum equal to one year's salary of the deceased.

²⁴ Salaries of congressmen and of officers of Congress were temporarily (1933) reduced by 15 per cent for reasons of economy.

mile for travel to and from the sessions, and allowances for stationery and clerical help. Not infrequently a member appoints as his secretary one of his own family. In May, 1932, it was revealed that well over a hundred relatives of congressmen were so engaged. Some were actually working for their money; with others it was simply a "racket" by which family income was increased.²⁵ Some working appointees have learned valuable political lessons in this practical school of politics. Ruth Hanna McCormick, formerly Congresswoman from Illinois, and Senator Robert M. La Follette II both served apprenticeships under their fathers, who were members of the Senate.

THE FRANK. The frank, that is, the privilege of the free use of the mails, is a very valuable possession of a congressman. Not only does he use it in an official capacity; but often he uses it for his own political purposes or in the interest of his party. Speeches delivered on the floor, as well as "unspoken speeches," are printed and distributed by the ton among the voters.²⁶ Obviously, this gives a congressman who is a candidate to succeed himself a considerable, and rather unfair, advantage over other aspirants for the seat.

Privilege from arrest. Senators and representatives are at all times subject to arrest for treason and felony—that is for all indictable crimes. For such crimes they may be held and prosecuted as are other individuals. But, if they are attending the sessions of Congress, or are on their way to or from such sessions, they are not subject to arrest for minor offenses, nor may they be detained by court orders in civil cases. This privilege from arrest comes from English practice, with which all well-informed Americans were familiar in 1787, and it is, of course, one of the means of maintaining the freedom and independence of lawmakers.

Freedom of speech. It is essential that legislators be given the right to speak their minds freely and without fear of interference on the part of those outside the legislative halls. Members of the English Parliament won this privilege some centuries ago, and it was enjoyed by our colonial legislators. The Constitution extends this immunity to congressmen in the provision that "for any speech or debate in either House they shall not be questioned in any other place."²⁷ The privilege applies not only to "any speech or debate," but it applies generally to things done in a session of a House by a member in relation to the business before it. In 1913 an individual who assaulted a member of the House of Representatives was arrested, arraigned at the bar of the House, and, by direction of its members, censured by the Speaker, although the representative

²⁵ *Time*, May 30, 1932, p. 9.

²⁶ Indulgent congressmen often permit their colleagues to have printed in the *Record* addresses which are not delivered on the floor and which are prepared only for the voters' consumption.

²⁷ Art. I, sec. 6, cl. 1.

had been assaulted for something he had said in a debate in a previous session of Congress.²⁸ A congressman, in a debate on the floor, may make the most scurrilous attacks on private individuals and be perfectly secure against slander suits; or he may, even when his country is at war, deliver disloyal and "un-American" speeches without risk of prosecution, although such speeches would probably send a private citizen to prison.²⁹ Clearly, this freedom of speech may be abused; but without it, congressmen, standing in fear of civil suits and criminal prosecutions, would be all too effectively gagged for the best interests of the public. There are, of course, practical limits to the privilege of free speech. The House to which a member belongs may discipline him for his excesses, or even expel him; or the electorate may retire him to private life, where he must assume legal responsibility for any further extravagant charges or scathing denunciation. It should be mentioned, also, that the privilege here under discussion does not protect a congressman in a political way. Thus, his utterances on the floor of his House may be fairly criticized by the press and by individuals, and they may be used against him in a campaign to show that he is unfit to represent the people.

The disciplining of members. The authority of each House of Congress to "punish its members for disorderly conduct, and, with the concurrence of two thirds, expel a member,"³⁰ may be discussed in connection with the privileges of our national legislators, since the disciplinary power is invoked against those who abuse their privileges or who otherwise step beyond the bounds of propriety. In keeping with the wide freedom guaranteed to our legislators by the Constitution, the two chambers have generally allowed their members great latitude.

1. **CALLING A MEMBER TO ORDER.** Occasionally a member is called to order by the presiding officer, as Senator William Saulsbury was in 1863 when he referred to President Lincoln as "a weak and imbecile man." Vice President Marshall, on May 14, 1920, reminded Senator Sheppard that he had violated Senate rules by his statement that in Prohibition matters New Jersey had placed herself "on the side of revolution and anarchy."³¹

2. **CENSURE.** On rare occasions, congressmen have been censured by their colleagues. One of these rare occasions occurred on November 4, 1929, when the Senate resolved, by a vote of 54 to 22, that the action of Senator Hiram Bingham of Connecticut in placing Mr. Charles L. Eyanson of the Connecticut Manufacturers' Association on the Senate pay roll during the preparation of a tariff bill, "while not the result of corrupt motives, is contrary to good morals and senatorial ethics and

²⁸ *Cong. Record*, May 9, 1913, p. 1452, 63d Cong., 1st Sess.

²⁹ Alexander, *op. cit.*, p. 141.

³⁰ Constitution, Art. I, sec. 5, cl. 2.

³¹ Quoted in Luce, *op. cit.*, pp. 512, 646, respectively.

tends to bring the Senate into dishonor and disrepute and such conduct is hereby condemned.”³²

3. **EXPULSION.** As for the extreme disciplinary measure of expulsion, it has been resorted to about twenty times, usually on the ground of notorious disloyalty to the country, but in a few cases for moral turpitude. A number were expelled on the former charge during the Civil War. It is hardly necessary to add that, in relation to expulsion as well as to other forms of punishment, partisan strife and personal animosities are quite as likely to control the matter of discipline, or lack of it, as the actual guilt of the member disciplined. In the day when Congress and the country were much agitated over the slavery question, Senator Sumner delivered a long speech in which he insulted and ridiculed Senator Butler of South Carolina. A few days later, Representative Preston Brooks, a kinsman of Butler, entered the Senate Chamber and beat Sumner, who was sitting at his desk, into insensibility with a heavy cane. One representative even defended “the liberty of the cudgel”; another stated that Brooks “merited the highest commendation,” and that Sumner “did not get a lick more than he deserved.”³³ Although the majority in the House roundly denounced Brooks’s conduct, the resolution for his expulsion failed to receive the necessary two-thirds vote. Had the cowardly and hot-headed Brooks used his “knock-down arguments” on any senator other than the extreme, vain, and unpopular Sumner, there is little doubt that the resolution would have been carried.

Compelling the attendance of absent members. Somewhat related to the disciplinary power is the authority of each House to compel absentees to attend its sessions. A majority of each body “shall constitute a quorum³⁴ to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members,” says the Constitution.³⁵ In pursuance of this authority the House of Representatives empowers as few as fifteen members present, in the absence of a quorum, to send for and arrest absent members, wherever they may be found, and to secure and retain their attendance.³⁶ Such absentees, when presented at the bar of the House by the sergeant-at-arms or one of his assistants, are discharged from arrest. But suppose a member brought in under arrest, or any other member, for the purpose of preventing a quorum and thereby rendering the House helpless to do business, refuses to answer to his name when called. This peculiarly annoying form of obstruction was not infrequently employed up to 1890, at

³² *New York Times*, November 5, 1929.

³³ Quoted in Alexander, *op. cit.*, pp. 140-141.

³⁴ “A quorum consists of a majority of those members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House.” Speaker Cannon, quoted in Alexander, *op. cit.*, p. 156.

³⁵ Art. I, sec. 5, cl. 1.

³⁶ Rule XV, sec. 2.

which time Speaker Reed ruled that members physically present should be noted legally present. "I deny your right, Mr. Speaker, to count me as present," said a member who became angry and vocal under this ruling. "The Chair is making a statement of fact that the gentleman from Kentucky is here," replied Reed. "Does he deny it?"³⁷ This demonstrated the strength of Speaker Reed's position, a position which shortly thereafter was incorporated into the rules of the House. Without the authority to count as present members sitting in a sort of conspiracy of silence, the constitutional power of a legislative body to compel absent members to attend would be hollow indeed. The Senate also has a rule under which it compels the attendance of absent members. In November, 1942, the Senate ordered the arrest of eight of its members who were obstructing the business of the Senate by absenting themselves from the Chamber. Senatorial dignity seems to have been considerably ruffled by their procedure, several of the arrested senators being outraged.

V. THE SESSIONS OF CONGRESS

Regular sessions. The original clause of the Constitution relative to sessions specified that "Congress shall assemble at least once in every year . . . on the first Monday in December, unless they shall by law appoint a different day."³⁸ Congress never exercised its authority to appoint a "different day"; so that it always assembled for its regular sessions on the day mentioned in the Constitution. As we noted on preceding pages in this chapter, the first regular session of a Congress began in December of the odd year, thirteen months after it was elected. This was called the long session, since it continued through the winter, spring, and sometimes well into the summer. The next December the second regular session began, and since it had to conclude its business before noon on the fourth of the following March, when the terms of the congressmen expired, it was commonly referred to as the short session. In view of the fact that the members of the succeeding Congress were chosen a month before the old Congress met for its short session, this session was frequently dubbed the "lame duck" session. The Twentieth Amendment fixes January 3 as the date for beginning the terms of congressmen and the sessions of Congress.³⁹ By this arrangement the short session is abolished.

Special sessions. In our discussion of the legislative powers of the President we learned that the Constitution gives him the authority to convene both Houses of Congress, or either of them, on extraordinary

³⁷ Quoted in Alexander, *op. cit.*, p. 168.

³⁸ Art. I, sec. 4, cl. 2.

³⁹ Congress has already exercised its authority under this amendment to "appoint a different day" for the assembly, but only for the purpose of moving the date a little further from New Year's Day.

occasions.⁴⁰ About twenty special sessions of Congress have been called, a number of them at the time new Presidents took office. We should add that special sessions at the beginning of administrations have so frequently brought Chief Executives bad luck that they are now "looked on with an almost superstitious aversion."⁴¹ Some forty times the President has convoked the Senate alone for the purpose of securing action on appointments and treaties. On such occasions the members of the House are left at home, since their chamber has no legal authority in such matters.

Numbering of Congresses and their sessions. The two-year terms of Congress are numbered consecutively, the Congress which started with Washington in 1789 being designated, of course, as the First, and that which came in with President Roosevelt in 1933 as the Seventy-third. The sessions of each Congress, whether regular or special sessions, are also numbered consecutively. Thus, we refer to the Sixty-ninth Congress, Second Session; to the Seventy-first Congress, Third Session.

Adjournment of Congress. "Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting."⁴² These limitations, relating only to separate adjournment of the two chambers, have no reference to the adjournment of the whole Congress. The date for closing a session is fixed by agreement between the House and the Senate. If the two Houses cannot agree upon a date, then the President may fix the time,⁴³ a function which the President has never been called upon to discharge. In practice, therefore, the only power the President has over the sessions of Congress is in calling a special session. When in such sessions, the two Houses fix the date for adjournment just as if they were in regular session.

VI. ORGANIZATION OF THE HOUSE OF REPRESENTATIVES ⁴⁴

A. Officers

The Speaker of the House. The first concern of a new House of Representatives, after the clerk of the preceding House has called the roll, is the election of the Speaker. It is singular that this, the most important officer of the House, who does practically no speaking except in the discharge of his duties as presiding officer, should be called "Mr. Speaker." The explanation of the title we find in the early practice of the English House of Commons, when its members, having no authority to make laws,

⁴⁰ Art. II, sec. 3.

⁴¹ Luce, *op. cit.*, p. 137.

⁴² Constitution, Art. I, sec. 5, cl. 4.

⁴³ Constitution, Art. II, sec. 3.

⁴⁴ Alexander, *op. cit.*, Chs. II-VII; R. Luce, *Legislative Procedure* (1922), Chs. I-V, XIX-XXII; F. M. Riddick, *Congressional Procedure* (1941), Chs. II-VII; *Rules of the House of Representatives*.

sent one of their number to "speak" for them to the King, to ask His Majesty for redress of grievances, new laws, or amendments to old laws. This function of the Speaker ceased to be of any importance after the Commons became a lawmaking body, but the title has remained in Great Britain and in those countries and dominions which have adopted her political institutions. Our Speaker is invariably a member of the House and one of the senior representatives of his party. The member thus honored is chosen in the House caucus of the majority party, and his election follows automatically in the House. The caucus of the minority party also names a candidate for the office, and its members go through the form of voting for him when the Speaker is elected. When the result is announced, the defeated candidate gallantly escorts the victor to the Speaker's chair, and with some gracious word presents him to the House. The "Father of the House," that is, the member who has had the longest continuous service as a representative, administers the oath and the Speaker-elect becomes "Mr. Speaker."⁴⁵

THE AMERICAN SPEAKER A PARTISAN OFFICER. In spite of the fact that the speakership in the lower houses of our state legislatures and in our national House of Representatives was adopted by the Americans from the practice of the English House of Commons, the institution on this side is quite different from what it is in Great Britain. The Speaker of the House of Commons, at his first election, is chosen by the majority party; but, once elected, he immediately divests himself of all partisanship and presides over the House with the impartiality of a judge, rather than as a party man who has found a high place from which he can serve his political organization. No better conception of the political detachment of the English Speaker can be gained than by reflection upon the fact that he is re-elected from time to time, for as long a period as he is willing and able to serve, regardless of what party happens to be in power. The American Speaker is elected by the majority party, frankly uses his office to further the interests of his party; particularly its legislative program, and as soon as his party loses its majority, a Speaker is chosen from the other party. The late Speaker Longworth thus stated his own and the American conception of the Speaker's office: "I believe it to be the duty of the Speaker, standing squarely on the platform of his party, to assist in so far as he properly can the enactment of legislation in accordance with the declared principles and policies of his party and by the same token to resist the enactment of legislation in violation thereof."⁴⁶ The difference between the American and British conceptions of the speakership is not to be explained by the doubly false statement that the Americans are unconscionable partisans and that the Englishmen in the Commons all work together for the good of their country. The explanation is

⁴⁵ Alexander, *op. cit.*, pp. 30-36.

⁴⁶ Quoted in Riddick, *op. cit.*, p. 49, from *Cong. Record*, 69th Cong., 1st Sess., p. 382.

rather in the fact that in the English system of government practically all of the party leaders sit in the House of Commons,⁴⁷ thus making it possible for a party to detach a Speaker; while our system does not permit executive officers, a number of whom are invariably important party leaders, to sit in Congress, thus making it highly desirable that the Speaker be left free to use his office in the interest of his party's legislative projects.

THE SPEAKER'S DUTIES AND POWERS. The Rules of the House require the Speaker to take the chair at the hour the House meets (usually at 12 m.), "immediately call the members to order, and on the appearance of a quorum, cause the *Journal* of the proceedings of the last day's sitting to be read, having previously examined and approved the same." It is his duty to preserve order and decorum on the floor of the House, and, in case of any disturbance in the galleries or in the lobby, he may cause the same to be cleared. He must sign all acts, addresses, joint resolutions, writs, warrants, and subpoenas which may be ordered by the House. He puts all questions, and announces the decisions of the House. He may vote in ordinary legislative proceedings if he so desires; but the rules provide that he shall not be required to vote except when his vote would be decisive, or when the voting is by ballot. Formerly, he had wide powers in the appointment of committees; but at present he appoints only the select and conference committees. The Speaker may name any member to serve in his stead for three days, and, in case of illness, he may, with the approval of the House, name some one to perform the duties of the chair for not longer than ten days. The House elects a speaker *pro tempore* if the Speaker is absent and has failed to appoint a member to serve in his place. In forming a Committee of the Whole House, the Speaker is required to leave the chair after appointing a chairman to preside.⁴⁸

Before 1911—"Tzarism". For well over a century the Speaker had the authority to appoint committees of the House, a power which made him the master of the group over which he presided. John Quincy Adams, in righteous indignation, denounced the iniquity of the system; and in 1849, Joshua Giddings stated, quite correctly, that the Speaker's right to appoint committees gave him more influence in the government than was exercised by anyone else except the President.⁴⁹ From time to time the fight against this particular power of the Speaker was renewed, until, in 1910-1911, the authority to appoint committees, except select and conference committees, was taken from him. In spite of this great loss of power, the Speaker was by no means reduced to insignificance. Among the important powers he still enjoys, we may mention his power to decide questions of order and to recognize (or not recognize) members.

⁴⁷ A few are in the House of Lords.

⁴⁸ Rules I; X, sec. 2; XXIII, sec. 1.

⁴⁹ Alexander, *op'cit.*, Ch. V.

Deciding questions of order. The Rules of the House require the Speaker to decide all questions of order, subject to an appeal by any member. Under this provision, the Speaker, generally following the precedents of the House, makes many decisions on points of parliamentary law in the course of a session. Sometimes he gives his reasons for his decisions; at other times he does not. A Speaker who measures up to the requirements of his office has various methods of taking the sting from his decisions. Feelings may be smoothed by an urbane compliment, a flash of wit, or similar tactics. Thus, Speaker Longworth, in "replying" to a parliamentary question asked by a Democrat for the purpose of embarrassing him, said amid laughter: "I think your question is more Democratic than parliamentary." As noted above, a member may appeal from the Speaker's ruling, but it is seldom done. Those members who are of the Speaker's party have every reason to avoid vexing him, while those who belong to the opposition are in the minority and have little hope that a vote of the House would sustain an appeal against a decision of the Speaker.⁵⁰

The power of recognition. Another important power of the Speaker is his right to recognize members seeking the floor. In practice, there is no appeal from the Speaker's decision as to who shall have the floor. This does not mean, however, that the Speaker may be absolutely arbitrary in the exercise of this power. He must follow the practices of the House. For instance, when the order of business brings a particular bill before the House, the Speaker must first recognize the member who represents the committee which is reporting the measure. Still, the Speaker has wide discretion. Frequently, since about 1890, the Speaker has asked a very irritating question of those who have not previously arranged with him for recognition: "For what purpose does the gentleman rise?" If the gentleman is seeking recognition in order to propose a motion on a matter which, in the Speaker's opinion, is not properly before the House, he is not given the floor. When, some forty years ago, William Sulzer stated that he rose to introduce a resolution extending sympathy to the Boers, Speaker Henderson went so far as to say that "the Chair must recognize members upon matters which the Chair thinks should be considered." On a similar occasion, Speaker Reed showed more tact in dealing with a member from Tennessee. The Speaker looked sharply at the Republican floor leader, who, quickly interpreting the look, moved to adjourn. The motion being carried, the Tennessean was left high and dry.⁵¹

The refusal to entertain dilatory motions. A minority group cannot, of course, enact laws; but on many occasions such groups, skilled in the intricacies of parliamentary practice, have prevented majorities from leg-

⁵⁰ Riddick, *op. cit.*, pp. 56-57.

⁵¹ Alexander, *op. cit.*, pp. 59-60.

islating. Under the leadership of Speaker Reed, the long-suffering House, in 1890, adopted the rule that "no dilatory motion shall be entertained by the Speaker."⁵² This rule has been made applicable to motions to adjourn and to lay on the table, among others. The Speaker does not exercise his authority until it becomes apparent to the House that the motion is dilatory, and he very seldom invokes the rule then unless a member raises a point of order. Obviously, the Speaker will not entertain debate or appeal on his decision as to the dilatoriness of a motion; for that would defeat the whole purpose of the rule. Since one fifth of the members present have the constitutional right to demand the yeas and nays on any question, such a motion may not be overruled as dilatory although it may be clearly of that character.⁵³

IMPORTANCE OF THE SPEAKER. Despite the strong political position of Speakers, they have found the two miles of Pennsylvania Avenue which connects the Capitol with the Executive Mansion all but impassable. Only one Speaker, James K. Polk, a "dark horse" at that, has ever been able to travel it. Clay was three times a candidate for President; Blaine just missed being elected; but no other Speaker has managed to get the nomination. The explanations commonly given for passing over Speakers in making presidential nominations are that their views on national affairs are too well known; that they have offended too many men whose support they must have in securing a nomination; and that partisan politics, which always clings to the Speaker's chair, and the odor of "pork," which often does, do not commend the Speaker to the American people. It must be said also that many of the Speakers have been mediocre men who were elevated to the office by the rule of seniority; and, finally, that the road to the White House is paved with administrative, not legislative, experience.

The clerk. In addition to the Speaker, the House chooses a clerk, a sergeant-at-arms, a doorkeeper, a postmaster, and a chaplain.⁵⁴ We noted above that the Speaker is chosen separately and is always a member of the House. The other officers are chosen in a group by resolution and are never members. Of these officers, the clerk is the most important. His duties are: to preside at the commencement of the first session of each Congress, pending the election of a Speaker; to furnish each member, at the commencement of every regular session of Congress, a list of the reports which it is the duty of any officer or department to make to Congress; to print the *Journal* of the House, and to distribute the *Journal* and all documents printed by order of either House to members and delegates; to attest and affix the seal of the House to such warrants and documents as

⁵² Rule XVI, sec. 10.

⁵³ *House Rules and Manual*, sec. 785.

⁵⁴ The employees of the House, working under the direction of the Speaker, clerk, and other officers, number about 400. The party in control of the House sees to it that the good places at its disposal go to members of the party.

subpoenas; to certify to the passage of all bills and joint resolutions; to make or approve all contracts for material and labor for the House; to keep and pay the stationery accounts of members and delegates; to pay the salaries of officers and employees of the House; and to perform other administrative duties of a character similar to those here enumerated.⁵⁵ In the discharge of all these duties the clerk is assisted by about a dozen subordinates appointed by himself.

The sergeant-at-arms and other officers. The sergeant-at-arms maintains order under the direction of the Speaker or chairman; executes the commands of the House in serving subpoenas on witnesses, compelling the attendance of absent members, and so on; pays the salary and mileage of members and delegates as provided by law; and controls the Capitol police. Like the clerk, he appoints the necessary assistants. The door-keeper enforces the rules of the House relating to the privileges of the hall; assists the sergeant-at-arms in enforcing decorum on the floor; clears the floor of unauthorized persons; introduces to the House the bearers of messages; acts as custodian of such property of the House as furniture and books; directs the work of some half a hundred messengers and other employees; and supervises the janitor service. A postmaster superintends the post office kept in the Capitol and House office building for the convenience of members. A chaplain opens each day's sitting of the House with prayer.⁵⁶

Certain employees, appointed by the officers or key members of the House, should be mentioned. The legislative counsel, composed of lawyers and clerks, assists officers and committees with the drafting of bills and similar technical matters. A parliamentarian, an expert on legislative procedure, sits at the Speaker's right and advises him on the varied and complicated rules of the House. The parliamentarian also assists in drafting rules of procedure, and advises committees and members on methods of procedure.

B. Party Leaders in the House

Floor leaders. The Speaker, already discussed, is commonly the most influential leader of the majority party. Next in importance to the Speaker, perhaps rivaling him in influence, is the majority floor leader, chosen by the party caucus. The minority in like manner chooses its floor leader. Neither floor leader is an officer of the House; but, barring exceptional cases, the leader of the party in power becomes Speaker when that office becomes vacant, and the minority leader is elevated to the speakership when his party obtains a majority. The floor leader may or may

⁵⁵ Rule III. Some of the duties of the clerk and other officers of the House are imposed by law as distinguished from those required by the Rules.

⁵⁶ Rules IV-VII.

not be the ablest man of his party's delegation in the House; but he must be a man of firm will, sound judgment, and good temper. Above all, he must have a capacity for appreciating and using the serviceable qualities of his colleagues. A good floor leader has the gift of clear and forceful expression, the ability to spot weak points in the arguments of opponents, and the power to safeguard the interests of his party. The majority floor leader aids the Speaker in disentangling parliamentary snarls, in pushing the business before the House, and in checkmating any interference with the majority party's legislative program.⁵⁷ The majority leader has a great deal of influence from his position as chairman of the powerful steering committee, which selects for consideration a small percentage of the thousands of bills introduced at every session. Under normal conditions, a floor leader properly qualified for the position will have considerable success in holding his party group together; but under unusual circumstances, he may fail. Thus, Underwood, the Democratic floor leader in the first years of the Wilson administration, on several occasions found his colleagues following the determined lead of the President rather than his own. In the case of the repeal of the clause exempting American coastwise trading vessels from the payment of tolls in the Panama Canal, the President won, not only in the face of the opposition of the floor leader, but in contravention to the provisions of the Democratic platform. On February 15, 1931, we witnessed the interesting spectacle of the House, led by Republican Speaker Longworth, voting by an overwhelming majority for increased loans to veterans on their bonus certificates despite the protests of President Hoover and the efforts of the Republican floor leader, Tilson, to prevent the passage of the measure. Off the floor of the House, the opposing floor leaders are frequently in conference on the legislative program. The minority must know the plans of the majority and the majority needs the co-operation of the minority.

Other leaders. Hardly less influential in the House than the floor leaders are the chairmen of the important committees. By long service in the House and on committees devoted to certain phases of its work, they have acquired something approaching mastery of the intricacies of legislative procedure as well as of the functions of the committees of which they are chairmen. A very important committee is that on Ways and Means, and its chairmanship ordinarily goes to one of the ablest men of the majority party. The chairman of the Appropriations Committee, frequently called the "Budget Committee," should be ranked in importance with the chairman of the Ways and Means. The heads of a dozen or more other important committees have considerable voice in the House. Occasionally, members who are too young in the service to be chairmen of committees but who nevertheless have marked ability may take some leading part in the proceedings. The minority party has no great part

⁵⁷ Alexander, *op. cit.*, p. 109; Riddick, *op. cit.*, pp. 64 ff.

in leading the House; but its outstanding members, in addition to the floor leader, often assist the majority leadership in matters not involving party policies. It is the right, indeed the duty, of the minority to scrutinize the proposals of the majority and to indicate favoritism, flaws, and inadequacies therein.

The whips. Each party has a member who carries a "whip" and who is so designated. The whip is appointed by his floor leader, and the whip in turn names a number of assistant whips. They serve the party organization, giving particular attention to orders and suggestions from the floor leader. The whips are supposed to know where all the party members are at any time, and, in the course of an hour, by a division of labor among them, they are usually able to get an opinion of the party membership on a legislative proposal, give them information, bring them to the House for a vote, or represent to them other plans and purposes of the leaders.

C. The Committees

Their importance. It is perfectly obvious that the House as a whole cannot find time to consider the 10,000 or 20,000 bills which are introduced in the course of two years. This work is done for the most part by committees, and the House simply acts upon the committee reports. In other words, the House places its official stamp upon what is unofficially agreed upon in the committees or uses the committee recommendations as bases for its action.

Types of committees. When we speak of the committees of either House of Congress, we ordinarily have in mind the regular standing committees which are reconstituted at the beginning of each Congress. Since they are the most important, we reserve them for the moment and refer briefly to the special committees.

1. **SELECT COMMITTEES.** From time to time, the House directs the Speaker to appoint select committees—committees created temporarily for the purpose of considering some question which cannot be appropriately or expeditiously handled by a standing committee. The committees of investigation with which the country has grown familiar, especially during the past decade, are of this type. Some of these committees are joint committees of the House and the Senate.

2. **CONFERENCE COMMITTEES.** A conference committee is appointed by the Speaker to confer with a similar committee from the Senate whenever the two Houses fail to agree upon a measure. The purpose of the conference is to effect a compromise agreeable to both branches of the Congress. Like the Simon-pure select committee, the conference committee is discharged when it makes its report.

3. **THE JOINT STANDING COMMITTEES.** The joint standing committees are to be distinguished from the conference committees. The former are

regular committees provided for by concurrent resolutions of the two Houses and chosen in the same manner as the regular standing committees. Joint committees deal with matters, chiefly of a routine character, in which both Houses are interested. Such committees are those on enrolled bills, the library, and printing.

4. THE STANDING COMMITTEES. As noted above, the standing committees are the committees which are entitled to the most attention. A few years ago there were more than sixty of these committees, but of late the number has been reduced to about forty-five. Of these, only about a fourth are of great importance. In the list of powerful committees we include those on Ways and Means, Appropriations, Banking and Currency, Interstate and Foreign Commerce, Agriculture, Military Affairs, Naval Affairs, Post Office and Post Roads, and Rules. The large number of relatively unimportant committees is continued because it is difficult to abolish a standing committee once it is created; which in turn is largely explained by the fact that the more committees there are, the more coveted chairmanships there are to distribute. The number of members who serve on a committee varies from about forty on the Committee on Appropriations to the three who are deemed sufficient to constitute a Committee on Memorials. The average membership of a committee is around twenty-one, a number which insures the representative character of a committee and which makes possible its division into subcommittees for the study of special projects. The chairman and the majority of the members of each committee belong to the party in power. Some eight or ten of the committees are so important that they are designated as "exclusive" committees in the sense that membership upon any one of them precludes assignment to any other committee.

We have already stated that prior to 1911 the members of standing committees were appointed by the Speaker. In that year, the rule for their election by the House was adopted. As a matter of fact, each party designates its members who are to serve on committees. The Democratic caucus chooses the party's representation on the Ways and Means Committee and gives this group the authority, subject to the approval of the caucus, to select the Democratic members of all the other committees. The Republican caucus chooses a committee on committees, which in turn designates for ratification by the Republican membership the party's representatives on the committees of the House. With the committees thus chosen, the House then goes through the rather empty form of electing them.

Almost invariably, the senior member of the majority party's representation on any committee will be its chairman. When new men are elected to the House, they are assigned to the lowest places on committees; and upon their re-election, they are usually reassigned to the same committees but to higher places, making room at the bottom for the latest group of

new members. This process goes on in Congress after Congress, and a member's rank is gradually raised until he becomes the senior among his party colleagues on a committee, when he usually receives the chairmanship, if his party is in power. This is the well-known seniority rule. It is obvious that the rule does not necessarily mean that ability, or industry, or any other highly desirable quality, except that of experience in the House, will be found in a committee chairman. The rule does, however, have the merit of being easy to administer, and it is true that the seniors are usually among the best-qualified men for chairmanships. To abolish the rule would probably precipitate unseemly scrambles and intrigues for chairmanships, which would be much worse than the occasional unfortunate situations to which the present system gives rise. Few chairmen serve for a long period of time; for a change of parties in control of the House automatically puts them out of their high place, and there is also the ever-present possibility that a constituency may fail to re-elect a representative even though he is chairman of an important committee.

The Committee on Rules. The work of each committee commonly relates to a particular subject or type of subject; but the Rules Committee covers the whole matter of procedure in the House and has such far-reaching powers that we must give it special attention. Originally a small and comparatively unimportant select committee, the function of which was to report on rules at the beginning of each Congress, it became a standing committee in 1880; and later, with the Speaker as its chairman, it dominated the House. In 1910 the Speaker lost his place on it, but the Committee did not lose its power to control the House. At present there are twelve men on this Committee, four or five of them belonging to the minority party, and practically all of the dozen being seasoned veterans in legislative procedure.

THE RULES. Every legislative body which has been in existence for any length of time develops a somewhat elaborate set of rules of procedure. The lawmakers, of all men, should follow an orderly process. The House of Representatives started with a few rules (based largely upon English and colonial rules,) framed by James Madison and several other distinguished parliamentarians. A few years later, Vice President Jefferson prepared his *Manual* for the Senate, and this *Manual* came to be used also in the House in all cases in which it was not inconsistent with the House rules.⁵⁸ Rules have been added more or less haphazardly from time to time, and more important still, almost innumerable precedents have been established by decisions of the Speaker, until the whole body of rules and precedents partakes of the prolixity of a legal code.⁵⁹ Few, if any, mem-

⁵⁸ Rule XLIII.

⁵⁹ See A. C. Hinds, *Precedents of the House Representatives*, Vols. I-IV (1907), and Clarence Cannon, same title, Vols. IV-VIII. These "precedents" cover about 10,000 pages.

bers understand them fully, and there are always a number of members who denounce them as arbitrary and seek to have them changed.

How the committee blocks changes in the rules. Now the time to propose changes in the rules is when a new House is being organized; for any proposals which are made after the organization is completed are referred automatically to the Committee on Rules, and there is practically no chance that the skillful and somewhat hard-hearted parliamentarians who dominate this Committee will report any new rules which will impair their power to control the business of the House. We note, then, that the Rules Committee has a decided voice in determining what the rules of the House shall be, especially in respect to any changes which may be offered after the House is organized.

THE SPECIAL ORDERS OF THE RULES COMMITTEE. Much more important than the power just mentioned is the significant part the Committee plays in directing the business of the House. It is right here that it is an indispensable ally of the majority floor leader and his right-hand assistants, the members of the steering committee (presently to be discussed.) The Committee on Rules, through its special orders, if approved by a majority of the House, may give precedence to particular measures; limit the time for debate on them; and specify the number and nature of amendments. Thus, if those who are supposed to control the House are temporarily outgeneraled in a matter of procedure, they can rely upon the Rules Committee to come to their rescue with a special rule of some sort which will be adequate to the exigency. When a special order of the Rules Committee has been adopted, all moves for delaying the passage of a bill are blocked, and however tragic the gestures and noisy the lamentations may be against the bill in the brief period allowed for debate upon it, such stage play does not prevent the measure from having a speedy passage.

When the Independent Offices bill was under consideration in January, 1934, a rule was submitted which prohibited any amendment from the floor which would affect the economy sections of this appropriation bill or any other appropriation bill to come before that session of Congress. Republican minority leader Bertrand Snell turned white. "Just say to us that the Appropriations Committee and the President are going to do everything," he angrily cried in typical minority leader fashion. "Abolish your regular committees," he shouted. Turning to the Democrats, he exhorted: "Vote down this gag rule!" A number of disgruntled Democrats took his advice, but the rule was adopted by a narrow margin—197 to 192. The President called the steering committee to the White House. They returned to the House of Representatives and did what was expected of them; they corralled forty-one maverick Democrats and smashed an opposition move to defeat the Independent Offices bill by a vote of 240 to 141.⁶⁰

The steering committee. We have just intimated that this committee

⁶⁰ *Time*, Jan. 22, 1934.

has very important powers in connection with the business of the House. This is not officially a committee of the House. It is a committee of the majority party. In 1942 the Democratic steering committee was composed of four ex-officio members—the Speaker, the majority leader, the chairman of the majority caucus, and the chairman of the Rules Committee—and fifteen others chosen by the Democratic representatives from fifteen geographical divisions of the country. This uniparty and unofficial committee is charged with the duty of determining Democratic policy in the House and, in co-operation with the Rules Committee, with the responsibility of carrying such policies through the House.⁶¹ It is thus even more powerful than the Rules Committee, for the latter will not report special rules unless they are demanded by the steering committee.

D. The Caucus

Mention has been made from time to time of the caucus, an institution unknown to the Constitution. Perhaps the student has decided that it is the power which really directs the House of Representatives. It does, to a considerable extent, although to a lesser degree now than formerly. Each party has its caucus, but the caucus of the majority party determines to some extent the organization and the work of the House of Representatives. All the members of the House who are “reasonably regular” party men belong to their party’s caucus.

The work of the caucus. The caucus meets when it is called by the chairman upon his own motion, or when he is requested to call it by a group of its members or the party leader. Its most important meeting precedes the organization of a new House of Representatives. Among its important functions we may note the following: it nominates the party’s candidates for the House offices, which is tantamount to election in the case of the majority caucus; it selects the party floor leader; it provides for a steering committee if the party is in power; it approves assignments to the standing committees; it passes upon the work of party members and in some cases supervises and controls the work of its members who are on these committees; it may give preliminary and sometimes detailed consideration to important measures before the House or which are to be presented to the House; and, in general, it shapes the legislative policy of the party. All these things are done behind the scenes. The proceedings are according to party rules; they are not covered by the Rules of the House, much less by the Constitution and laws of the United States. The caucus is a part of our extra-constitutional government. Formerly it was an essential feature of the party system, but during the past decade administrative influence has reduced the importance of the Democratic caucus.

The power of the caucus. Members of the party delegation in the

⁶¹ See the statement of a member of this committee in Riddick, *op. cit.*, p. 348.

House are expected to vote on important party questions before that body in conformity with the decisions of the party caucus. Thus, by the rules of the Democratic caucus, members are obligated to support for offices in the House the candidates who have received a majority vote in the caucus; and "in deciding upon action in the House involving party policy or principle, a two-thirds vote of those present and voting at a caucus meeting shall bind all members of the caucus; *Provided*, The said two-thirds vote is a majority of the full Democratic membership of the House: *And provided further*, That no member shall be bound upon questions involving a construction of the Constitution of the United States or upon which he made contrary pledges to his constituents prior to his election or received contrary instructions by resolution or platform from his nominating authority."⁶² The caucuses do not attempt to bind members on non-essential matters; and "entire individual independence" is allowed, to quote again from Democratic rules, "in all things not involving fidelity to party principles." This provision gives the members a wide area of freedom, since perhaps 90 per cent of the measures in Congress are nonpartisan in character. The Republican caucus makes less attempt to bind its members than does the Democratic caucus, and, to indicate its liberality, the G.O.P. in recent years has commonly used the term "conference" to designate the private meetings of its adherents in the House. But, whether the gatherings are styled conferences or caucuses, no party allows such freedom to its members that they may vote with impunity contrary to the group decisions on the important matter of party candidates for the House offices.

How the caucus enforces its decisions. The ordinary member of the House cannot afford to act contrary to the decisions of his party caucus. If the caucus votes 100 to 50 for the support of a party principle or measure in the House, the minority must yield to the judgment of the majority, at least to the extent of voting for the project on the floor of the House. There are usually some members who will not be bound by the caucus; but they are discriminated against in the committee assignments, their pet measures are ignored, their constituents will be encouraged to choose other representatives, their social life is likely to be restricted, and their opportunity to rise in the House is just about nil. The treatment of "insurgents" by the party regulars is not conducive to insurgency. The average member feels that his only hope of accomplishing anything for his constituency or securing his own advancement is in "going along" with the majority of his party. We talk a great deal about majority rule, yet it is perfectly clear that the majority of the majority caucus (frequently a minority of the whole number of representatives) rules in the House when party principles and policies are at stake. But, in order to make sure that

⁶² Mathews and Berdahl, *op. cit.*, pp. 433-434.

we do not overemphasize the power of the caucuses, we repeat that many measures are nonpartisan in character and that in respect to them the caucuses allow, as previously indicated, "entire individual independence." It should be further stated that in these days, the caucus seldom tries to bind its members on any legislation, even on so-called partisan measures. But it still asserts itself with vigor on the choice of officers and on other matters relating to House organization.

Conclusion as to leadership in the House. A generation ago, in the days of Reed and Cannon, the caucus selected the Speaker and left him practically free to direct the legislative body, the caucus retaining what we might call "ultimate sovereignty." The so-called "revolution" of 1910-1911 deprived the Speaker of some of his powers, particularly of his important power to appoint committees, and gave the caucus the authority to make the committee assignments and a sort of continuing directing power over the work of the House. But the Democratic caucus, the majority group after 1911, delegated a number of its powers to the Democrats who sat on the Ways and Means Committee. In 1913 Wilson assumed and maintained the leadership of Congress, and the chief duty of party leaders in the House was to see that his legislative program was carried out. With the return of the Republicans to power in the House in 1919, the caucus of that party assumed control; but it worked largely through the Speaker, the floor leader, and the steering committee.

This system was not essentially changed when the Democrats gained a majority in 1931. But with the election of Franklin D. Roosevelt, presidential leadership of Congress was even more effectively installed than it had been in the days of Wilson. In 1942 Vice President Wallace, Speaker Rayburn, the majority floor leaders of the two Houses, and occasionally a chairman of a principal committee were holding regular weekly conferences at the White House. This "legislative cabinet" assembled to hear the wishes of the President, to inform him of congressional sentiment, and presumably, to plan with him the legislative program for the week. Yet it may be said, that the majority caucus, through leaders of its own choosing, generally directs the actual operations of the House. At times these leaders are allowed practically a free hand; at other times the caucus prefers to retain a share of the control of the party's legislative program and tactics. Whether the caucus controls the House directly or a few party leaders (the President and others) control both the caucus and the House, depends upon the political capacity of the leaders and upon the spirit of the caucus. Finally, we may observe that under whatever form of effective leadership the representatives may happen to be functioning, the minority party and the insurgents in the dominant party will complain of "gag rule," the "steam roller," "dictatorship," and the like. But the occasions when the House has attempted to democratize its methods or when

competent leaders have not been among its members, have demonstrated the necessity for the very directing power which the minorities periodically, and sometimes hypocritically, denounce.

VII. ORGANIZATION OF THE SENATE

We have already noted that the Senate is a permanent body, with the term of only one third of its members expiring every two years, whereas the entire 435 members of the House must be elected biennially. Being a permanent body and having a membership of less than one fourth that of the House, the Senators are not troubled with rules and organization to the extent the legislators in the other end of the Capitol are. The Senate does, however, have its rules and its precedents, and it makes rather liberal use of the *Manual of Parliamentary Practice* which Jefferson prepared when he presided over the Senate. In organization the Senate does not differ fundamentally from the House, although we shall note a few exceptions.

Officers of the Senate. In our discussion of the office of Vice President we noted that as President of the Senate he has no powers save those of a moderator; that he has no vote except in case of a tie; that he is not even a member of the Senate. As everyone knows, he is not of the Senate's choosing, and he is in no sense the power in the Senate that the Speaker is in the House. If the Vice President should show signs of not "knowing his place," senators would not be slow to show it to him. The Senate elects a president *pro tempore*, who presides when the Vice President is absent or when there is no Vice President. Other officers of the Senate correspond to those of the House and they are chosen in the same way, that is, in the Senate caucus of the majority party, and then formally elected by the whole body of senators. Although not an officer of the Senate, the majority floor leader, chosen by his caucus, is usually a very important figure in its deliberations. The minority caucus also chooses a floor leader, as in the House.

Senate committees. Just as in the House, the caucus or conference of each party chooses a committee on committees, which supercommittee then makes the assignments to the various standing committees, subject to the approval of the caucus. The Senate then formally elects the committees. Before 1921 there were seventy-four committees, well over half of them practically useless; but in the year named, some two score of these were eliminated. The most important committees are the following: Appropriations, Agriculture, Commerce, Finance, Foreign Relations, Interstate Commerce, Judiciary, Military Affairs, Naval Affairs, and Post Offices and Post Roads. The committees of the Senate have fundamentally the same functions as the similarly named committees of the House. Perhaps we should explain that the Finance Committee corresponds to the power-

ful House Committee on Ways and Means, and that the Senate Committee on Foreign Relations, to which must be referred all treaties and presidential appointments to posts in the foreign service, is by virtue of these facts much more important than the House Committee on Foreign Affairs. Considering the number and size of the Senate committees (they are only slightly smaller than those of the House), it is not surprising that a senator ordinarily serves on four or five of them. The seniority rule prevails, as in the House; but no senator may serve as chairman of more than one of the ten important committees named above.

The Committee on Rules and the steering committee. While the Senate has a Committee on Rules, this Committee has no such powers as are wielded by the House Rules Committee. The steering committee, like that committee in the House, consists of the principal leaders of the majority party; but, unlike the House committee, it does not dominate the Senate proceedings. Apparently, its chief functions are to pick out the measures to which the party is pledged and to secure the support of the party's senators for the passage of those measures. In making its appeal, the committee rests its case on the interests of the party and makes little or no attempt to force senators into line.⁶³ We may conclude, then, that the Senate organization, while similar to that of the House, is not so complex; and that there is much more independence allowed individual senators than is allowed representatives.

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Congress: Procedure and Powers



I think it was Bismarck who said that the man who wishes to keep his respect for sausages and laws should not see how either is made. With reference to the laws, a knowledge of how they are made may increase our respect for them and their makers; and if it does not, we are at least able to express our dissatisfaction in an intelligent manner. At any rate, the student of government must know something of how laws are made, and we take the greater part of this chapter to introduce the subject; in the last two sections we round out the discussion with a summary of the powers and suggestions for the improvement of Congress.

I. HOUSE PROCEDURE ¹

The introduction of bills. Bills may be introduced by any member of either House of Congress. It is true that the Constitution requires that all revenue bills shall originate in the House; but the power of the Senate to amend such bills beyond all recognition operates to deprive the House of a large part of this advantage. The bills may be divided into two general classes, public and private. A public bill is one which alters or adds to the general law, or which deals with government finance; whereas a private bill is one of a purely local or personal nature. The important public bills are commonly prepared and introduced by appropriate committees. Frequently, however, these legislative proposals come from the President or some branch of the executive department. As far back as 1926, Robert Luce, long a member of the House and an authority on its procedure, estimated that at least half of the bills came from administrative sources, and in 1940 he declared: “. . . Now almost no important bill is passed upon save upon administrative initiative or with previous approval of the Chief Executive.” ² These proposals—administrative measures—are formally introduced in the House by spokesmen for

¹ D. S. Alexander, *History and Procedure of the House of Representatives* (1916), Ch. XIV; R. Luce, *Congress—An Explanation* (1926), Ch. I; F. M. Riddick, *Congressional Procedure* (1941), Chs. VII–XIII, and his articles in the *Am. Pol. Sci. Rev.* (XXXV, 284 and XXXVI, 290), for procedure in 1940 and 1941.

² *Op. cit.*, pp. 3–4, and Riddick, “Third Session of the Seventy-sixth Congress,” *Am. Pol. Sci. Rev.*, XXXV, 284, note (April, 1941). See also E. E. Witte, “Administrative Agencies and Statute Lawmaking,” *Public Administration Review*, II, 116 (Spring, 1942).

the Administration, usually by chairmen of committees who may have received the bills direct from the White House or one of the subordinate administrative agencies. Ordinary bills are introduced by rank and file congressmen, but, in many cases, not on their own initiative. An individual, a business concern, a labor organization, a farm association, a reform society, or what not, may originate a bill and find some obliging congressman to introduce it. A member need assume no responsibility by introducing such a bill. He may make a friend or friends by so doing. At any rate, by showing an accommodating spirit, he can avoid giving offense. It is now easy to understand why Congress is flooded with bills at every session.

Bills in committee. The four to eight thousand bills introduced in the course of a session are referred to committees. Private bills are referred by the persons introducing them to the committees designated by the rules to receive them. Public bills are referred under the direction of the Speaker, as are messages from the President. It often happens that a bill may relate to subjects within the province of two or more committees, in which case it is referred to the committee having most apparent jurisdiction. It sometimes happens, however, that the proposed legislation is so complicated and pertains to the subject matter of two or more committees in such degree that a special committee is appointed with jurisdiction over the whole problem. Separate sections of important bills, such as tariff measures, are usually referred by the committee in charge to its subcommittees for special study and report. It does not take a committee (more particularly its chairman) long to decide that the vast majority of the bills referred to it are not worthy of consideration. Such measures die quietly "in committee," and there are few indeed who mourn their passing; for nearly all of them deserve their fate. Formerly, the signatures of a majority of the membership of the House were required to bring to the floor a bill which a committee would not report. In 1931 this was changed from a majority (218) to 145. Even with the "discharge" rule thus liberalized, the required number of signatures was obtained in only four instances during the "long session" of the Seventy-second Congress.³ Yet Democratic leaders found it necessary to make a "backward move to Canonism" by restoring the majority discharge rule in 1935. Republicans twitted them by observing that the old rule was being restored in order to make it possible for the Democratic leaders to control their own followers, since there were not enough Republicans to supply the 145 signatures needed under the "liberal" discharge rule. The first important function of the committees, then, is to chloroform the thousands of worth-

³ E. P. Herring, "First Session of the 72nd Congress," *Am. Pol. Sci. Rev.* (1932), XXVI, p. 850. Wages and Hours Bill became the first and only bill to pass the House under the "discharge" rule and become a law by the approval of the Senate. Riddick, *Cong. Proc.*, p. 272.

less, freak, and vicious bills. Occasionally a committee kills a bill which merits consideration by the House, but mistakes and abuse of power are inevitable in all human institutions.

COMMITTEE HEARINGS. In considering the bills before them, the members of a committee draw from their experience and knowledge of the matter in question. There are usually some men on a committee whose term of service and whose application to duty have given them a very wide knowledge of the subject with which the committee deals. Available for use by the committee are the Library of Congress with its important legislative reference division, the various reports and documents supplied by the executive departments of the government, and the findings of special investigating committees of Congress. More important than any of these sources of information for legislative action is the committee "hearing." Persons for or against a proposed measure may appear, voluntarily or by order of the committee, and give testimony. Some of these hearings run for several days or even weeks, with as much of the public in the committee room as can be accommodated and with the press of the country giving as much attention to the hearing as it is giving to the work on the floor of the House. Not infrequently administrative officials play the leading part at the hearings. This is quite likely to happen when administrative bills are before a committee.

THE COMMITTEE IN EXECUTIVE SESSION. With the information before it, a committee then goes into executive session. Its deliberations are secret, and remain secret. It is in these sessions that the committee does its best work. Members cannot play to the gallery; for there is no gallery to play to. They can honestly and sincerely exchange views, change opinions, make the compromises so indispensable to legislation, and cast their votes, free from some of the trammels of partisan politics. We may complain loudly against secrecy in government affairs, but in most human affairs there are certain stages which demand secrecy, and the deliberations of a committee are properly the secret stage in legislation.

THE COMMITTEE REPORT. We noted above that thousands of bills are allowed to die without even being considered by a committee. Occasionally a bill is dropped after consideration has shown it to be unwise or inexpedient; but in the case of most bills which it considers seriously, the committee takes some form of affirmative action. It may report the bill to the House, with the recommendation that it be passed as introduced; it may report it with sections stricken out, or with additional sections, or with changes in wording; or it may frame a new bill. A report in any one of these forms gives a bill a good running chance to pass the House, but it by no means insures passage.

Importance of the report. Considering the power of a committee to kill most bills by not reporting them and the tendency of the House to pass bills favorably reported by a committee, we can easily understand

why committees are often called "little legislatures," as indeed they are. While a bill is officially passed by some three or four hundred representatives, its fate is largely determined by a majority, sometimes by a bare majority, of a committee. Often the committee, in making its report, follows the decision of a subcommittee, and that body its ablest or most skillful member. Thus, the representative votes on faith, except on those few matters about which he may have more information than the rank and file of his colleagues. It should be so; for only by dividing the work among groups which contain a few specialists and then following these specialists, can the House approach intelligent action on several thousand bills in the course of a few months.

The bills before the House. Measures reported by committees are placed on the calendars of the House. Bills relating to revenue, appropriations, and public property are placed on the "Calendar of the Whole House on the State of the Union," commonly called the "Union Calendar." All other public bills are placed on the "House Calendar." Private bills are listed on the "Calendar of the Committee of the Whole House," more conveniently designated as the "Private Calendar." Measures are supposed to be taken up in the order in which they appear on the calendars, but there are so many bills that it is impossible to consider them all, and, in consequence, important bills or those with a strong backing are selected with scant regard for the order of their appearance on the calendars.⁴

The "order" of business. Rule XXIV prescribes the following as the daily order of business in the House: prayer; reading of the *Journal*; correction of reference of public bills; disposal of business on the Speaker's table, such as messages from the President; unfinished business; the "morning hour" (which may include the whole day) for the consideration of bills called up by committees; and motions to go into Committee of the Whole for the purpose of considering certain bills, particularly revenue and appropriation bills. The House is not, however, bound to this daily routine. Certain days are set aside for particular types of measures: Wednesdays for bills on the House and Union Calendars, two days a month for the Private Calendar, the second and fourth Mondays for the business of the District of Columbia. Furthermore, the regular order of business is frequently interrupted, with the consent of the majority, for such privileged matters as revenue and appropriation bills, conference reports, and special orders reported by the powerful Committee on Rules. Again, in the case of matters not privileged, any member may ask for "unanimous consent" for the consideration of a bill, and, if granted, this suspends the order of business temporarily. Finally, on certain days, a two-thirds majority of the

⁴ The House never finds time to consider all the bills favorably reported by committees. The long sessions of the 69th, 70th, 71st, and 72nd Congresses failed to act upon 10, 11, 33, and 51 per cent, respectively. R. Luce, "Petty Business in Congress," *Am. Pol. Sci. Rev.* (1932), XXVI, p. 816.

House may suspend the rules and put a measure through almost in the twinkling of an eye. The "regular order" is a convenient schedule to follow when possible, but in adopting it the House did not "lock itself in an iron cage and throw away the key." It wisely provided for quick and easy methods for setting the regular order aside, thus making it possible to bring matters of vital importance before it at any time.

Procedure in Committee of the Whole. The House considers bills much more frequently in Committee of the Whole⁵ than it does in formal session. This Committee is the House in personnel, but it is not officially the House. When in Committee of the Whole House on the State of the Union, the mace, the ancient symbol of authority, is removed from the pedestal at the Speaker's chair. The Speaker himself leaves the chair after appointing some other member to preside. While a majority constitutes a quorum of the House, the Committee quorum is one hundred. The chief purpose of the Committee is to expedite business. No time-consuming roll calls are permitted. By common practice general debate is had after the House "resolves" itself into the "Committee of the Whole House on the State of the Union" and before the third reading of the bill. Time for general debate is usually arranged by unanimous consent of the House upon suggestions from the Chairman and the ranking minority member of the committee reporting the bill, and the time may be fixed at one or two hours or many hours or even days. Sometimes no time limit can be fixed in the early stages of debate, in which event debate continues until members have talked themselves out, or, until the House is able to reach an agreement upon time. The practice is for the time for general debate, whether limited or not, to be under the control of the ranking members of the committee reporting the bill, though variations are had and frequently some faction or group that is not in sympathy with the attitude of either the majority or the minority is granted a certain amount of time. Theoretically, this time for general debate is supposed to be on the bill under consideration. In practice, however, the debate is of wide character, sometimes on the bill and sometimes on matters that are wholly extraneous. At the conclusion of general debate the Committee takes up the consideration of the bill under the "five minute rule," each speaker being allotted just that much time for debate. Such debate is naturally to the point and much more lively than the more formal utterances in the official sessions. With the discussion and amendment of a bill completed, the Committee "rises" and reports to the House, its official self. Affirmative action by the House gives effect to the work of the Committee.

House Debates. Debate, other than that which occurs in the Com-

⁵ Technically, there are two Committees of the Whole: the Committee of the Whole House, for considering private bills; and the Committee of the Whole House on the State of the Union, for considering revenue and appropriation bills. Riddick, *Cong. Proc.*, pp. 142 ff.

mittee of the Whole House on the State of the Union, ordinarily takes place on the floor of the House before the vote on the third reading⁶ has been taken. Theoretically, each member may speak for an hour; but a member who manages to get half an hour considers himself lucky. The Committee on Rules brings in a special order limiting the time which may be spent in debate on nearly all important measures except appropriation bills. Each side gets half of the time specified, and the chairman of the committee in charge of the bill divides the time among the majority members who wish to speak, while the ranking minority member of the committee apportions the time among his minority colleagues. Often there are so many members of the committee who desire to discuss a measure that there is no time left for others, and, in any case, the time allowed for a speech is likely to be limited to ten or fifteen minutes. Frequently, before taking up private bills, an understanding is reached to apply the five-minute rule, as in Committee of the Whole; or, that no debate shall occur and that only bills to which there is no objection be considered. It is a common saying that the House can do anything by "unanimous consent." There is really very small opportunity for genuine debate in the House. Perhaps that does not matter greatly; for the public pays little attention to the few which take place there, and it is only occasionally that a speech of a leader changes the vote of a member. Years ago, De Tocqueville expressed his contempt for some members of the French Chamber of Deputies by saying that they were so naïve that an oration might change their votes. As already indicated, our representatives make their most interesting and effective arguments when in Committee of the Whole.

CLOSURE. With the large number of bills before the House, it is necessary to expedite business as much as possible. The House does not have time to hear all the members who wish to speak in good faith; much less can it afford to give free rein to representatives who resort to obstruction tactics. Several means of securing quick action are employed. We have already learned that the rules may be suspended by a two-thirds vote; that a majority may adopt a special order of the Rules Committee limiting the time for debate; that the Speaker may refuse to put dilatory motions; and that a quorum may be compelled to attend, so that the House can transact business. All these practices save time, but the only motion used for closing debate is the handy timesaving device known as the "previous question," borrowed from the British House of Commons. A floor leader or the chairman of the committee responsible for the bill "demands the previous question," and the motion must be put at once by the Speaker. If this motion is carried, then a vote on the bill or resolution under consideration is immediately taken. If, however, there has been no debate on the

⁶ The three readings are technical terms, each indicating a stage in the progress of a bill through the House.

subject before the House, forty minutes (usually divided evenly between the two sides) is allowed for the purpose.

How more time might be saved. Much more of the precious time of the House could be saved if the body would abandon the archaic practice of the oral reading of bills, leaving members to consult their printed copies. It is estimated by Robert Luce that about a month of each term is taken up with "clerical enunciation." Still more time could be saved if the House would install a system of electrical voting, already used by the legislatures of several states. Several hundred times in the course of a Congress the question of the presence of a quorum is raised, and each "quorum call" consumes about half an hour. The formality of reading the *Journal*, the toleration of irrelevant debate, and the quibbling over points of order should be added to the list of time consumers. Remedies could be had for some or all of these delays, but inertia blocks the way.⁷

Voting in the House. The House makes its decisions, of course, by votes. Of the four methods employed, the chorus of ayes and noes (*viva voce*) is the most common. Any member who feels that the Speaker's announcement of the result is incorrect may call for a rising vote. A third method is used when a fifth of a quorum demands tellers, who count those voting for and then those voting against a measure as they pass between them in front of the Speaker's desk. Finally, if one fifth of those present care to exercise their right under the Constitution, they may require that the members vote by individual "yeas" and "nays" and that each vote be recorded in the *Journal*. The Constitution demands this method of voting when the question is: "Will the House on reconsideration agree to pass the bill, the objections [veto] of the President to the contrary notwithstanding?" The Committee of the Whole employs the same methods of voting as the House, with the exception that the individual yea and nay vote is not used.

II. SENATE PROCEDURE ⁸

It is unnecessary to go into detail on the subject of Senate procedure, because, in the main, it is similar to that of the House. We shall be concerned here only with the matter of Senate debate; for that is the only important difference between Senate and House procedure. The first rules of the Senate adopted in 1789 provided for the "previous question," but it was used only a few times and it was quietly dropped when the rules were revised in 1806. For many years abuses of the privilege of unlimited debate were infrequent, the senators giving heed to a phrase in Jefferson's *Manual* that "no one is to speak impertinently, or beside the question,

⁷ See Luce, *op. cit.*, pp. 27-29.

⁸ G. H. Haynes, *The Senate of the United States* (1938), Vol. I, Chs. VII-VIII; Riddick, *Cong. Proc.*, Ch. XIV; L. Rogers, *The American Senate* (1926), pp. 161-190.

superfluously or tediously." Obviously the freedom enjoyed by senators served as an incentive to put forth the best efforts. No one prepared a speech with the fear that time would not be secured for its delivery, or that the time would be so limited that only an outline of the speech might be given. Minorities were able to spend the full force of their fury upon the handiwork of the majority; independents could take the floor against the autocracy of their party; executive departments might quail under the pitiless searchlight of unhurried solons; and public opinion might be aroused by revelations in the Senate forum. Considering the opportunities there presented, it is not surprising that many of our greatest statesmen have sought places in the Senate and that other great statesmen have been developed on its floor.

The filibuster. But the Senate grew larger and members were chosen who had no compunctions about speaking "beside the question, superfluously, or tediously," if they could manage by such speaking to achieve their ends. By holding the floor, a senator could delay or prevent the passage of a measure to which he was opposed. More commonly, a small group of senators worked together, delivering relays of speeches, thus holding the fort indefinitely. This oratorical obstruction in our country is known as "filibustering"; in Australia, as "stonewalling." In the winter of 1890-91 a filibuster lasted for two months. Individual senators have shown remarkable endurance in the rôle of filibusters. Senator Allen of Nebraska spoke for fourteen hours in the filibuster against the repeal of the Silver Purchase Act in 1893. A few years later, Carter of Montana consumed an equal number of hours in talking a pernicious river and harbor bill to death. La Follette the elder broke the record in 1908, holding the floor for more than eighteen hours against a currency measure. This particular filibuster failed because the blind Senator Gore, a member of the relay team, ceased talking in the erroneous belief that Senator Stone, who was to follow him, was in the Chamber. The opposition was quick to take advantage of this mistake, and promptly put its measure through. Of course, in a filibuster, speeches are ordinarily of a rather poor quality, the sole object being to consume the time of the Senate and to wear out the patience of its members. In lieu of a speech, Senator Tillman of South Carolina, in 1903, threatened his colleagues with Byron's *Childe Harold* and such other poems as might be necessary to bring them to include in an appropriation bill an item settling a war claim presented by this state. The Senate soon yielded. Four years later, Senator Stone, filibustering against a ship subsidy bill, read *Pilgrim's Progress*.

THE DEBATE ON THE ARMED MERCHANT SHIP BILL. The use of the filibuster to obstruct legislation was brought most forcibly to the attention of the country in the few days preceding the adjournment of Congress in March, 1917. President Wilson had asked Congress to pass a law authorizing him to arm merchant vessels in order that they might protect them-

selves from German submarines. The House passed the bill by a vote of 403 to 13. Nearly all of the senators favored the bill; but a minority of eleven held the floor until Congress adjourned, thus preventing the enactment of the measure.⁹ The President, sure of popular support, then wrote one of the strongest notes of his career. "A little group of willful men, representing no opinion but their own," he declared, "have rendered the great government of the United States helpless and contemptible." He concluded by calling upon the Senate to change its rules.

THE CLOSURE RULE OF 1917. Under this pressure, the Senate adopted a mild form of closure. At any time, a motion to close debate upon a measure, if signed by sixteen senators, may be presented to the Senate. Two days later the presiding officer puts the question: "Is it the sense of the Senate that the debate shall be brought to a close?" This question must be voted upon without debate; and if two thirds of those voting, a quorum being present, decide in the affirmative, the measure becomes the unfinished business to the exclusion of all other business until disposed of. Thereafter no senator may speak more than one hour; no dilatory motions may be put; and points of order must be decided without debate.¹⁰

It does not prevent filibustering. This rule has been successfully invoked only a few times. On November 13, 1919, Senator Hitchcock presented the necessary petition for securing a vote on bringing to a close the debate on the Versailles Treaty. Two days later the petition secured the two-thirds majority vote, and on November 19 the vote on the Treaty was taken. Closure was applied again in January, 1926, on the debate on American adherence to the World Court. It has been employed on several other occasions, but, in the main, the filibuster stands intact. It continues because the Senate is jealous of its long-established reputation for liberty of debate, and because it is seldom that two thirds of its membership is willing to "gag" a minority. Besides, the machinery for invoking closure is slow moving: first, the petition; then the lapse of two days before the vote upon it is taken; and, after the affirmative vote, an hour for each senator who wants it. For these reasons, a filibuster started near the time set for adjournment, as nearly all of them are, will usually prove successful. As Congress approached the end of its term in March, 1919, a few senators conducted a filibuster and blocked important legislation so that the President would be forced to call a special session. When the time for adjournment came, Vice President Marshall declared the Senate adjourned *sine Deo* (without God), instead of using the conventional phrase, *sine die*.

But a more drastic plan of closure is not likely to be adopted. Propo-

⁹ Senator Norris and other senators who opposed this bill deny with some heat that they were conducting a filibuster, maintaining, not without reason, that they were debating the measure on its merits.

¹⁰ Rule XXII.

sals have been made for a more drastic system of closure, but without success. Everyone knows of Dawes's dramatic attempt and complete failure (which he accepted with good grace) to force the Senate to reform itself. The late Senator Underwood proposed that the Senate use the previous-question device, but that each senator be allowed an hour for debate before the vote was taken. This proposition did not commend itself to his colleagues. Senator Norris held the opinion, on which many concurred, that the Twentieth Amendment, adopted January, 1933, would indirectly deal filibustering a very hard blow. Under the old system, Congress had to adjourn its last session of three months' duration on March 4. We have just noted that the obstructionists found their best opportunity in the last, crowded days of this short session. The "Lame Duck" Amendment removes the time limit that so long rested upon the last session of a Congress. Yet filibusterers still find ample opportunity for their game. One of our Founding Fathers used to say, "When in the majority vote: when in the minority talk." The rules of the Senate seem to be applied with that in mind. They give the minority's right to talk precedence over the majority's right to act. In 1936 Senator Black led a filibuster against the practice of subsidizing the merchant marine by means of exorbitant payments on ocean mail contracts. The late Senator Long conducted several one-man filibusters more or less successfully. In 1938 Senator Clark took advantage of a Senate rule which permits a quorum call (roll call) whenever the absence of a quorum is suggested, providing business has been transacted since the previous call. He obstructed the Senate for one day by alternating between making motions and compelling quorum calls. His motions were immediately laid on the table, but this did not matter at all to him—he could then again "suggest the absence of a quorum." The Anti-lynching bills were killed by filibuster several different times. In 1942, when there were votes enough and to spare to enact a measure outlawing the poll-tax as a qualification for voting in federal elections, Southern senators staged another successful filibuster. Senator Theodore Bilbo of Mississippi was their leader. His desk was piled high with reference books, including one on Japan. The Southerners were ready to talk for six weeks, and the Senate, ever carefully guarding the rights of individual senators, failed to muster enough votes to close the debate.¹¹ The problem, then, is not primarily one of the adoption of a more drastic closure rule, but rather the application of the rule which is now in the book.

A defense of the freedom of debate. There are many competent observers who justify the extreme freedom of debate in the Senate. Professor Lindsay Rogers, in his very careful analysis of the Senate, justifies unrestricted debate¹² on the ground that under our system of checks and

¹¹ Haynes, Vol. I, pp. 405 ff.; O. R. Altman, "Second and Third Sessions of the Seventy-fifth Congress," *Am. Pol. Sci. Rev.*, XXXII, 1115 (Dec., 1938); *Time*, Nov. 23, 1942, p. 22.

¹² *Op. cit.*, pp. 163-164, 168-169, 184 ff. Haynes, *op. cit.*, Vol. I, pp. 419 ff., is in substantial agreement with Rogers.

balances the Senate alone is able to serve as a check upon the autocracy of President and party. He points out also that the greater number of the bills defeated by the filibuster have deserved their fate. To the charge that the long debates prevent the Senate from disposing of a proper proportion of its business, he replies that the Senate gets much of its work done expeditiously; that the unanimous consent agreements, frequently used, are, in effect, species of closure. Finally, he shows that senators who complain of "unrestrained garrulity" of their colleagues do not always do so in good faith. For instance, Senator Stone, who read *Pilgrim's Progress* in a filibustering speech against a ship subsidy bill in 1907, roundly denounced those who conducted "a defiant filibuster without pretense of legitimate discussion" against the Ship Purchase Bill in 1915. In other words, a "filibuster is either a reprehensible artifice of a sinister opposition, or an ingenious and patriotic device of our friends for saving the people."¹³

Concluding, we may say that the Senate is the only great forum in the United States. Freedom of debate, more than anything else, makes it so. Although that freedom is frequently abused, those who would correct the abuse should proceed with great caution for fear of seriously impairing the usefulness of the Senate as a forum.

III. BILLS IN CONFERENCE COMMITTEES¹⁴

The Conference Committee. Everyone understands, of course, that bills and resolutions must pass the two Houses in identical language. Frequently, House and Senate differ as to the details of a bill. If one House changes or amends a bill passed by the other, the body in which the bill originated may accept such changes and amendments, thus settling the differences. But the two chambers are very frequently some distance apart on the provisions of important bills, and their differences are not often composed by the simple expedient of one chamber's obligingly accepting the amendments proposed by the other. Important matters on which the Senate and the House disagree are usually settled by conference committees—special committees composed of the important members of the standing committees having the bill in charge in each House and appointed by the presiding officers. The conferees meet and go over all points at issue on a bill, seeking to find a basis of agreement. Sometimes their work is soon done; at other times they labor for days; but in the give-and-take process which characterizes a conference, they usually effect an agreement sooner or later.

¹³ Quoted in Haynes, *op. cit.*, Vol. I, p. 418, from Edward E. Whiting, in the *Boston Herald*, Dec. 17, 1924.

¹⁴ Alexander, *op. cit.*, pp. 283–286; R. Luce, *Legislative Procedure* (1922), pp. 400–407; Riddick, *op. cit.*, pp. 197 ff.

In 1936 conference committees successfully reconciled Senate and House bills in 52 instances. They failed in three cases. All but eight of the 52 measures which were reported from the conference became law.¹⁵

ITS POWER. As long ago as 1884, John Sherman spoke out in protest against the powers of the conference committees. "I feel that both Houses ought to make a stand on the attempt to transfer the entire legislative power of Congress to a committee of three of each body, selected not according to any fixed rule, but selected probably according to the favor of the presiding officer or the chairman of the committee that framed the bill; so that in fact a committee selected by two men, one in each House, may frame and pass the most important legislation of Congress."¹⁶ Perhaps Sherman's language was somewhat extreme, but there is no denying that the conference committees are powerful factors in shaping legislation. The power of the conference, as Robert Luce explains,¹⁷ lies chiefly in the fact that the Houses accept its report without amendments, or reject it *in toto*. As a matter of fact, the report is quite likely to be accepted. This is true because the bills which "go to conference" are usually those which must in some form or other be enacted into law, and the rank and file of lawmakers feel that they cannot do better than take the word of the conferees as to the form in which laws should be enacted. Furthermore, many, if not most, of the great bills are referred to conference committees near the end of the session, leaving little time for any further consideration of them by the two chambers even if they are so disposed. Just as each House must leave the greater part of its work to be performed by the standing committees, so the two Houses must leave their disagreements to be settled by conference committees. For the delegation of authority in each case, the reason is essentially the same: the volume of business before Congress, a great deal of which is of a somewhat technical nature, cannot be considered in detail except by committees.

The question of using joint standing committees. The chief objection to the conference committee system is that it does not give the Houses a full opportunity to consider a matter agreed upon in conference; that the legislative bodies are practically at the mercy of the conference. If a bill were considered and reported originally by a joint committee of the two branches of Congress instead of being passed upon by separate committees of the two Houses, differences between the bodies could ordinarily be ironed out in the initial stages of a bill's history and the conference committee would have little to do. The joint committee system would give the two chambers a process for co-operative action from the time a bill reached the committee's stage, thus allowing members fair opportunity, in the course of a bill's passage, to examine and discuss the propositions

¹⁵ *Am. Pol. Sci. Rev.* (1936), XXX, p. 1093.

¹⁶ Quoted in R. Luce, *Legislative Procedure*, pp. 403-404.

¹⁷ *Ibid.*, p. 404.

agreed upon in joint committee; whereas the conference committee reaches its agreements after a bill has been through both Houses, and, in practice, leaves little opportunity in either House for the consideration of amendments proposed by the other. Furthermore, the joint committee system would save some valuable time for Congress; for under our present committee system a bill must be considered and reported twice—by the appropriate committee of each House. Robert Luce, long a member of the House, recommends more use of the joint committee, and he points to its satisfactory operation in several state legislatures.¹⁸ But the great majority of the members prefer the old system because they are accustomed to it or because they fear that senators would insist upon holding the prominent places on the joint committee. There is also a feeling among many members of the House that they take their committee work much more seriously than the senators do.

IV. BILLS AND LAWS

A bill which finally winds its way through the House and Senate labyrinths and is approved by the President, or passed over his veto, becomes a law.¹⁹ As such, it is in the select company of a very small group of measures which, out of the thousands introduced in Congress, have reached the statute books. Leaving out of consideration a few omnibus pension bills, which ordinarily include hundreds of private bills, not one measure in twelve of those introduced is enacted into law. Furthermore, of the legislative proposals which reach the statute books, the great majority relate to particular individuals, to localities, and to trivial changes or adjustments in the national administrative machinery. The great public bills which are passed in the course of the two-year term of Congress and which vitally affect the interests (chiefly economic) of the nation, can usually be counted on one's fingers.²⁰ It goes without saying that some measures are enacted which have little or no merit, and that not infrequently bills which seem most desirable unhappily fall by the wayside. But, considering the volume of work which Congress must do, the conditions under which it must be done, and the limitations of human beings, the wonder is that legislative attainment is as high as it is.

The statute books. At the end of each session of Congress, the laws and resolutions passed are collected and published as the *Statutes of the United States*, commonly called Session Laws. When a Congress has completed its two-year term, all of its acts and resolutions, all treaties concluded, and all presidential proclamations issued, are published in large

¹⁸ Luce, *Congress—An Explanation*, pp. 30-32. See also G. B. Galloway et al., "Congress—," *Am. Pol. Sci. Rev.*, XXXVI, 1097 Dec. 1942).

¹⁹ On the veto, see Ch. 11, sec. III.

²⁰ Luce, *Congress—An Explanation*, p. 32.

volumes (usually two) under the title of *Statutes at Large of the United States*. One volume contains the public acts and resolutions; and another, the private acts (mostly pensions and reliefs) and resolutions, concurrent resolutions, treaties, and proclamations. Occasionally, the statutes in force are compiled and published in immense volumes for the convenience of public officers, lawyers, and others. Sometimes this is done by private publishers, sometimes by the government. Recently the government published the *United States Code Containing the General and Permanent Laws of the United States in Force on January 3, 1941*.

V. PUBLICITY AND REPORTING OF PROCEEDINGS ²¹

House sessions invariably public. It was the common practice of earlier legislative bodies to deliberate on the "mysteries of state" in secret. Our colonial assemblies very seldom made exception to this rule, but the national House of Representatives made it a practice to open the galleries to the public from the beginning. While secret sessions were held on some occasions during the first few years under the Constitution, the last time the public was barred was in 1811. Following British precedent, ladies were not admitted as auditors in the early days; but when a fair admirer of Fisher Ames led a delegation to hear him speak, the ladies were admitted and the precedent was broken, permanently.

Senate sessions almost always public. Although the Senate did not ordinarily admit the public during the first years of its history, there were members who earnestly advocated open sessions. Commenting in his diary upon a resolution (1791) that the doors be opened, a senator from Pennsylvania observed: "I knew of no reason for keeping the door of any legislative assembly open that did not apply with equal force to us. The objections against it, *viz.*, that the members would make speeches for the gallery and for the public papers, would be the fault of the members. If they waged war in words and oral combats; if they pitted themselves like cocks, or played the gladiator, for the amusement of the idle and curious, the fault was theirs; that, let who would fill the chairs of the Senate, I hoped discretion would mark their deportment." ²² This sentiment prevailed in 1794, and a resolution was passed, providing that galleries should be constructed and opened to the public whenever the Senate should be sitting in a legislative capacity.

EXCEPT FOR SOME "EXECUTIVE SESSIONS." But, until recently, in considering nominations, treaties, and other more or less confidential communications from the President, the Senate sat almost invariably in secret sessions. Many questions so considered are extremely delicate, and excellent arguments for secrecy can be made; but with the increasing growth

²¹ Luce, *Legislative Procedure*, Ch. XIV.

²² Quoted, *ibid.*, p. 334, from the *Journal of William Maclay*, Feb. 24, 1791.

of democratic ideas, the practice received severe criticism. In recent years a number of senators strenuously objected to the secret executive sessions and considered but lightly their obligation to keep secrets, as was evidenced by the fact that the public was usually informed by them through the press as to what transpired when the Senate was sitting behind closed doors. Considering that the secrets of "secret sessions" were not kept and that the prevailing sentiment in the Senate and out was against secrecy, the Senate, in 1929, voted that all business should be transacted in open session, unless the majority voted for a closed session. It was further provided that, upon a majority vote, the proceedings of a secret session should be published; and that any senator was free at all times to make public his individual vote.

Reporting. The early legislative chambers permitted little or no written publicity of their proceedings. Writing of the colonial assemblies, Robert Luce informs us that in Virginia the public was not allowed to know what the laws were; that in North Carolina the public was not permitted to discuss the laws; and that in Massachusetts it was not to know how the laws were made. In the last-named colony, "Mr. Speaker" and some other members of the lower House drew up an order to prevent legislators "from discloseinge any of ye private businesses thereof abroad." ²³

The Journals. The democratic spirit of the Revolution changed this, and our Federal Constitution contains the requirement that "each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." ²⁴ However, the *Journals* contain only records of official actions. The debates, from which the public may learn a great deal of what determines legislative action, were not and are not published in them.

Early method of reporting debates. For years the debates were not published at all, except in a haphazard and unofficial manner. Thus, Webster's great classic, the "Reply to Hayne," was not taken down verbatim; but it was written out by a man who took notes on the speech and who conferred with Webster and others as to just what the Senator had said. The process of revision and correction went on for about a month, when the speech was finally published. Beginning in the 'thirties, private enterprise recorded and published the debates verbatim in the *Congressional Globe*, and since 1873, Congress has itself assumed the obligation of printing the debates in the *Congressional Record*.

The Congressional Record. The *Record* does not, however, give an exact account of what takes place in Congress. Members are allowed to revise their speeches before they are published; to insert long speeches, when only a few words were actually spoken on the floor; and even to place in the *Record* speeches delivered elsewhere, magazine articles, and various

²³ *Ibid.*, p. 342.

²⁴ Art. I, sec. 5, cl. 3.

types of material. In the Senate, a member may speak as long as he pleases, and there is consequently no reason why he should ask leave to print an "unspoken speech"; but he often puts other material in the *Record*. Is there any justification for such freedom? It is often impossible for a representative to give a satisfactory statement of his views in the few minutes at his disposal, and it would seem, therefore, that he has a fair claim to the privilege of "extending his remarks" in the *Record*. But everyone recognizes that the privilege is frequently abused, especially when a member uses it to make a political speech to his constituents, and then, under another privilege, the frank, mails it to the thousands of voters in his district. Such alleged speeches are deceptive and they add considerably to the cost of publishing the *Record*. Congress should at least devise some means of preventing the publication and circulation at public expense of "speeches" and articles which have little or no relation to questions at issue on its floor.

VI. THE LOBBY ²⁵

Before leaving the subject of congressional procedure, it is important that we give some attention to a well-established and much-discussed institution, the lobby. We have previously stated that congressmen seldom introduce bills on their own initiative; that they introduce them at the request of individuals, social organization, patriotic societies, economic groups, or what not. Many organizations, a number of them very powerful, maintain agents in Washington whose business it is to secure the favorable action of Congress upon measures advocated by interested groups and to accomplish the defeat of measures which are opposed by these groups. This business is called "lobbying," and those engaged in it are known as "lobbyists." It is not a new business; but since the national government has extended its powers over important social and economic matters, the lobby has naturally broadened its own activities and refined its processes. It is sometimes called the "Third House" of Congress. Representation in it is social and economic, especially the latter, and much more direct than in either the Senate or the House. The two constitutional Houses represent the great unorganized public, which has only hazy and conflicting notions of what it wants; while the lobbyists, informally, but often very successfully, represent special interests—interests which know exactly what they want—by pressing their claims upon harassed congressmen.

Types of lobbies. Organizations of manufacturers, mining industries, bankers, transportation companies, farmers, laborers, ex-soldiers, patriots,

²⁵ C. A. and Wm. Beard, *The American Leviathan* (1930), pp. 212-219; E. P. Herring, *Group Representation Before Congress* (1932); Frank Kent, *The Great Game of Politics* (1924), Chs. XLII-XLV; R. Luce, *Legislative Assemblies* (1924), Ch. XVII; *The United States News*, July 24, 1942, p. 18.

pacifists, Wets, Drys, and various other interests, are represented in Washington by their "legislative agents." Frank R. Kent, a close observer of what goes on at the national capital, writing in 1924, fixed the number of such agencies at 145 and estimated that about 60 of them were effective. Kent named the American Farm Bureau Association as having the most powerful lobby, and gave its chief agent the credit for the very effective work of the farm bloc in Congress.²⁶ Another powerful lobby is that maintained by the United States Chamber of Commerce, whose interest, by the way, is not always in accord with that of the farm groups, as was forcibly illustrated by the opposition the Chamber displayed to some of the activities of the Farm Board, created by Congress in 1929. Still another effective lobby is maintained by the American Association of Railway Executives. In the opinion of the late Senator Thomas J. Walsh of Montana and many others, the Joint Committee of National Utility Associations, often called the "power lobby," was at one time the best organized and financed of all the lobbies.²⁷

The A. F. of L. and the C.I.O. are very effectively represented by their legislative agents, and it is a matter of common knowledge that the Prohibition forces once had a powerful lobby. In every way equal to any other lobby in persistence and power is that of the veterans. In 1936 members of the House openly rejoiced that the three leading organizations of veterans had united on a bonus bill, thus making it possible for congressmen to please all. The entire membership of the Senate was present and voted on that bill—the first time in four years that such an attendance and vote was recorded.²⁸ At this writing, the farmers seem to have the most powerful lobby, and labor is a close second.

TYPES OF LOBBYISTS. Some lobbyists are men of high standing in the legal profession, and they are frequently able to present to committees or individual members of Congress in a convincing manner the legal aspects of proposed legislation which is of interest to their clients. A few lobbyists are recruited from the ranks of former members of Congress. They are engaged sometimes because they have a particular interest in and knowledge of the business they represent; but perhaps they are more frequently retained because of the use they are expected to make of the contacts and friendships they have with their former colleagues in Congress. In recent years, some former journalists, skilled in the art of using the press for building up public opinion suitable to their purposes, have joined the ranks of the lobbyists. Other lobbyists are chosen primarily because they have expert knowledge of the matter they are to present to our lawmakers.²⁹ Still others are not chosen by anyone; they simply go to Washing-

²⁶ *Op. cit.*, pp. 259-261.

²⁷ Walsh, "Lobbies and Lobbyists," *New York Times*, October 13, 1929, XX, 3.

²⁸ *Am. Pol. Sci. Rev.* (1936), XXX, 1102.

²⁹ C. A. and Wm. Beard, *op. cit.*, p. 215

ton and do their own lobbying when a question of vital interest to them is before Congress, or when they feel that it should be brought before Congress. A number of lobbyists, perhaps the majority of them, sincerely believe in the things they advocate. They are convinced that what is good for them and their principals is good for the country. This is usually true of those who lobby for reforms; but many others are no less sincere. Joseph R. Grundy, president of the Pennsylvania Manufacturers' Association and for many years a tariff lobbyist, frankly stated that his faith in a high protective tariff was next to his religion; that the American people believed in it too, or they would not have elected high-tariff men to office in 1928; and that the country would be better off if there were a hundred brilliant young tariff lobbyists to advise and assist congressmen in drafting a tariff bill.³⁰

There are free-lance lobbyists, of course, who will advocate any cause for which they are paid, and who even go so far as to serve several organizations or groups whose interests cannot possibly be harmonized. In July, 1942 the *United States News*³¹ stated that there were 628 organizations in Washington ready to supply witnesses for or against different types of legislation. One hundred eighty-two would speak for one or another kind of business or manufacturing, 24 for different phases of education, 10 for finance, 14 for youth, 27 for farming interests, 42 for labor, 43 for veterans, and so on.

The "good" lobbyist. Although there are lobbyists who are backed by so many votes that they become arrogant and even make threats, the common variety of "legislative agents" are usually very tactful. They have a wide circle of friends and acquaintances in Washington, and their personable qualities make it easy to add to this list. A newly elected congressman may rather naïvely form some very delightful friendships with persons whom he later learns to be lobbyists—a discovery which may or may not break the friendships. The "good" lobbyist not only "knows his way around" socially, but he is thoroughly familiar with the subject or subjects on which he attempts to form the opinions of congressmen; and, above all, he is a master of the intricacies of congressional procedure. His complete knowledge of procedure makes him a legislative strategist of the highest order: he knows when to attack and when to withdraw; when to take the citadel by storm and when to settle down to a long siege. He knows the representatives and senators—their moral and political strength, their ambitions, their mental processes—and he uses this knowledge skillfully, sometimes too skillfully for the public good. His principals allow him a generous expense account and pay him a good salary, usually as much and sometimes more than congressmen receive. Kent

³⁰ *Time*, Nov. 4, 1929, p. 13.

³¹ July 24, 1942, p. 19.

states that he knew one man whose salary was equal to the President's and that his clients received their money's worth.³²

How the lobbyists work. Lobbyists do not bribe our representatives. They do not bribe them for two good reasons: first, because congressmen who will accept direct bribes are few and far between; and, second, which may be explained in part by the first, lobbyists do not ordinarily offer direct bribes. No doubt, in some cases, an agent is in a position to offer a lucrative place in business to a congressman who will yield to his importunities, but this species of indirect bribery is probably not so common as some critics assert it to be. The strength of the lobbyist lies first in the fact that he knows infinitely more about the matter on which he attempts to influence legislation than does the average congressman. It is but natural that our legislators should listen to what he has to say. "If any person can tell me more about a pending bill than I know already, why," asked Speaker Reed, "should it be my duty to shun him?"³³ Other law-makers of high standing have testified to the expertness of the lobbyist. Is it not to be expected that congressmen, even after making allowances for the special interests of these experts, should be greatly influenced by the materials and arguments they present? Their influence is less to be marveled at when we consider that frequently there is no lobby on the other side of the question.

But let us not credit the success of the lobbyist to his expert knowledge alone. Many of them represent powerful economic and social organizations, organizations which do or may contribute handsomely to the party war chest or to the campaign funds of particular candidates. Furthermore, some of these groups control or influence tens of thousands of voters; and in states and districts where their strength is concentrated to any degree, they may easily make or break a congressman. Thus, legislators from agricultural areas cannot ignore the farm lobby with impunity; and those in whose districts labor is strong must treat the various labor lobbies with great respect. In 1935 the Walsh-Healey bill, regulating the conditions of employment in all firms receiving government contracts, was for ten months reposing with the House Judiciary Committee. Then William Green, President of the A. F. of L., wired all members of the Committee: ". . . I respectfully urge you to be present at meeting of the Judiciary Committee tomorrow morning . . . Your absence from this meeting will be construed as opposition to the measure and as unfriendly to labor. Our representative will be present at tomorrow morning's meeting. Do not fail us. Be present." It is a fact that all members of the Committee were present; that they favorably reported the bill; and that the House passed it.³⁴ This could easily be matched in effectiveness by a veterans' or

³² *Op. cit.*, p. 271.

³³ Quoted in Luce, *Legislative Assemblies*, p. 395.

³⁴ Quoted by O. R. Altman in his "Second Session of the Seventy-fourth Congress," *Am. Pol. Sci. Rev.*, XXX, 1102 (Dec., 1936).

farmers' lobby. If a member of Congress does not show interest in the cause a lobbyist promotes, word is quickly passed back to his constituents, and he is flooded with calls, telegrams, and letters. Lucky indeed is that congressman who is not menaced by the power of the lobby, and courageous is he who defies it. It is from fear of being voted out of office that many of the much harassed representatives and senators can bring themselves to see things as the lobby sees them.

To what extent is the lobby an evil? No intelligent citizen will deny that organizations and individuals should be allowed to present their claims and programs to legislative bodies. It is almost equally beyond denial that some groups and their lobbyists seek to do this with clean hands and in a straightforward manner. In fact, the motives which prompt them to act or the blameless character of their procedure may lead the public to object to the term "lobbyists" as applied to them. We can further state that the information furnished by a lobbyist, even if he is representing a very selfish interest, may be used with profit by intelligent legislators. What, then, are the evils of lobbying?

First, the organizations represented by lobbies have more than their share of influence in shaping legislation. The general public has no lobby,³⁵ and its interests are sometimes passed over when well-organized groups apply pressure to congressmen. It must be said, however, that the power of the lobby is often overestimated. Senator Thomas J. Walsh, whose record hardly leaves him open to the accusation of having attempted to screen either the lobby or his colleagues in Congress, seemed to think that the influence of the lobby has been exaggerated, especially that influence which men who claim to have a "pull" or to be "on the inside" are supposed to exert.

A second evil of the lobby is in the fact that the greater part of its work is done in secret. It is thus able to resort to pressure methods which would not bear the light of day, and, in particular, to use large sums of money of which no account is given.

The third bad effect of the lobby is that it undermines the faith of the people in their government. They know that the lobby is at work; they believe that it works effectively with a large portion of their lawmakers; and they become cynical on the subject of representative government. We may say, then, that, while many lobbyists neither have base motives nor use insidious methods, the lobby is an institution to be regarded with grave concern.

Means of curbing the lobby: 1. INVESTIGATION. Outcries have been made against the lobby from time to time, and these have sometimes been followed by investigations. Perhaps the most dramatic drive against it

³⁵ It is true that "The People's Lobby," directed by John Dewey and a few other liberals, is now functioning; but it cannot be said to represent the whole people, any more than the farmers' lobby represents them.

was launched by President Wilson in May, 1913, when he told the public of "extraordinary exertions being made by the lobby in Washington to gain recognition for certain alterations in the tariff bill." He denounced this lobby as numerous, industrious, and insidious. He made no specific charges, however; but the Senate committee which investigated the lobby found many concrete examples which sustained his general charge. As Senator Thomas J. Walsh put it, "the President had taken a shot in the dark and brought down a whole flock of ducks."³⁶ Many lobbyists left Washington—for the time being. Another important investigation of the lobby, again primarily a tariff lobby, was held in the fall of 1929. It revealed some questionable, if not dark, practices, as well as the fact that some concerns and individuals who employed lobbyists were duped by these hirelings to such an extent as to warrant their being placed in the "sucker" class. These investigations may cause lobbyists to move with more circumspection for a brief period, but their permanent result is practically nil. In May, 1932, President Hoover called attention to "the locust swarms of lobbyists who haunt the halls of Congress seeking selfish privilege for special groups and sections of the country, misleading members as to the real views of the people by showers of propaganda."³⁷ A particularly aggressive lobby was that which operated against the utility holding company bill (1935), a lobby which led to another investigation.

2. REGULATION. Presumably, the purpose of investigation is to assemble information which may be used in drafting a corrective statute. So far, the lobby investigations have not resulted in corrective legislation at Washington. Failure to legislate may be due to the fact that Congress has lost some faith in the power of statutes to correct evils. The problem of regulating the lobby is doubly difficult; for a method of regulation must be devised which will rid lobbying of its pernicious qualities without destroying its desirable features. It is hardly necessary to add that the difficulties in the way of preparing such a regulatory statute are almost insurmountable.

Lobbying goes on at state capitals³⁸ just as it does at Washington, and some of the states have attempted to regulate it. As long ago as 1890, Massachusetts passed a law requiring all legislative counsel and agents to register with the sergeant-at-arms, to give the names of their principals, and to list the bills the passage or defeat of which they sought to accomplish. Counsel, agents, and their employers were required to state, within

³⁶ *Op. cit.*

³⁷ Quoted in Herring, "First Session of the 72nd Cong.," *Am. Pol. Sci. Rev.* (1932), XXVI, 859.

³⁸ See L. Haines, *The Minnesota Legislature of 1909*, and same, 1911; and H. Hichborn, *Story of the Session of the California Legislature of 1909*, same, 1911, and same, 1913; Harvey Walker, "Where Does Legislation Originate?" *National Municipal Review*, XVIII, 565 (1929) and "Well Springs of Our Laws," *National Munic. Rev.*, XXVIII, 689 (1939); five articles on "Outside Influences," *Annals of the Amer. Acad. of Pol. and Soc. Sci.* (1938), CVC, 72-109.

thirty days after the close of the legislative session, the amounts used for the purpose of lobbying. It is rather obvious that a statute which requires publicity thirty days after the lobbying has been concluded is not particularly efficacious. Nevertheless, the few other states which have attempted to deal with the problem have, in a general way, followed the Massachusetts system; and it cannot be said that they have had any more success than that state in reducing the evils of the lobby. It is probable that the evils of lobbying will be overcome, if ever, by an awakened public conscience, not by statute.

3. THE QUESTION OF OCCUPATIONAL REPRESENTATION. An interesting proposal for breaking the power of the lobby has been made. Students have said that the chief reason for lobbying is that manufacturers, transportation companies, bankers, merchants, lawyers, teachers, farmers, laborers, and similar groups are not represented as such in Congress. It is urged that if occupational and professional groups of the type mentioned be given representation, lobbying would practically cease. Perhaps we should so remodel our government that some representatives could be chosen by "occupational constituencies," but there is certainly no immediate possibility of this being done. Furthermore, if it were done, would it stop the activities of the lobby? One can easily picture a business concern lobbying as indefatigably as ever, justifying its conduct on the theory that its particular interest was not being correctly presented or intelligently or vigorously urged by the representatives of the occupational group to which it belongs. The essence of lobbying often lies in singular devotion and service to a particular phase of business altogether too narrow to be allowed a group representative in the legislative body.

VII. POWERS OF CONGRESS

A. Legislative

The subjects on which Congress may legislate are enumerated in various clauses of the Constitution and in the amendments thereto, but the eighth section of Article I (which the student should now read carefully) contains nearly all of the important grants of power. The last clause (18) of this section is of tremendous importance; for it empowers Congress "to make all laws which shall be *necessary* and *proper* for carrying into execution the *foregoing powers*, and *all other powers* vested by this Constitution in the government of the United States, or in any department or officer thereof." This is the famous "elastic" or "implied powers" clause, explained in Chapter 2, section I. It is not necessary at this point to dwell on the legislative powers of Congress. The power of that branch of the government to legislate on executive organization and functions is discussed in Chapter 18, and its power to organize and prescribe the jurisdiction of the federal courts is discussed in the chapter on those courts.

Other far-reaching powers, powers relating to finance, commerce and business, labor, agriculture, conservation, health, national defense, and social security are given attention in other chapters. It is sufficient for present purposes to state that the powers of Congress, as now interpreted, reach to the daily life of the individual in various ways, although the states still have the authority to regulate the normal life of the individual in most particulars (except in time of war).

B. Judicial

Impeachment.³⁹ The Constitution gives the House of Representatives the sole power of impeachment, that is, the sole authority to vote the charges against a civil officer. The person against whom charges have been made is then tried by the Senate. Impeachment proceedings have never been instituted against a military officer, and it is very generally agreed that Congress has no authority to impeach such officers. In like manner, members of Congress are not subject to impeachment—a point which was decided when an attempt was made to impeach Senator Blount in 1798. But the President, Vice President, and all *civil* officers may be impeached for “treason, bribery, or other high crimes and misdemeanors.”⁴⁰ The terms “high crimes and misdemeanors” have been given a rather broad meaning in practice. Judges have been impeached for vicious personal habits and for conduct unbecoming a judge and one of the charges against President Johnson was that his public addresses were “intemperate, inflammatory, and scandalous.” In the case of conviction in an impeachment proceeding, the penalty must be removal from office, to which may be added disqualification for holding any other office under the United States. Any officer so convicted may then be tried in the regular courts for the crime or crimes for which he was impeached, and, if found guilty, receive sentence just as an ordinary criminal.⁴¹ While the President is prohibited from granting a pardon to one convicted in an impeachment, he may, of course, issue a pardon to cover the sentence of a court.

HOW IMPEACHMENTS ARE CONDUCTED. Impeachment procedure may be set in motion when a charge is made against a civil officer by a member of the House of Representatives, by the President in a message to the House, by the legislature of a state, or by other interested parties. A committee of the House may be asked to consider the charges; and if the committee favors impeachment, the House may then formally make the

³⁹ Haynes, *op. cit.*, Vol. II, Ch. XV; “Rules for Impeachment Trials,” *Senate Manual*; D. Y. Thomas, “The Law of Impeachment in the U.S.,” *Am. Pol. Sci. Rev.* (1908), II, 378–395; W. W. Willoughby, *Principles of the Constitutional Law of the U.S.* (1930 ed.), Ch. LXVIII.

⁴⁰ Constitution, Art. II, sec. 4.

⁴¹ Constitution, Art. I, sec. 3, cl. 7.

charges against the accused in a set of articles known as "articles of impeachment." A few members of the House, commonly called "managers," are then selected to conduct the trial in the Senate. If the President is on trial, the Chief Justice presides over the Senate, since the Vice President, who would succeed to the presidency if the Senate voted for conviction, might find presiding a delicate duty. The Senate proceeds in impeachment cases very much as a court, with each senator under oath to do "impartial justice according to the Constitution and laws." The managers act as prosecuting attorneys for the House, and the accused has his defense counsel as in an ordinary trial. Witnesses are subpoenaed, examined, and cross-examined, and the trial goes on with the public in attendance. The trial ended, the Senate votes in secret on each article of impeachment, and if impeachment is sustained by a two-thirds vote upon any of the articles, the accused stands convicted.

THE IMPEACHMENT RECORD. There have been thirteen impeachments (counting the abortive attempt to impeach Senator Blount) and only four convictions, although several resignations preceding the impeachment trials accomplished practically the same results as convictions. The four officers removed by impeachment were judges, and one other judge resigned after the House had voted for impeachment and just before the Senate had started the trial, with the result that action against him was dropped. Impeachment trials resulted in acquittal in the case of four judges. Likewise, W. W. Belknap, Secretary of War under Grant, was acquitted; and it is common knowledge that President Johnson was saved by one vote. Impeachment is, and should be, a remedy of last resort. It was never intended that it should be used by Congress as a political means of controlling the executive department or the courts. Perhaps the only time the power was seriously abused was in the hectic days of Reconstruction when Congress sought to remove its archenemy, President Johnson.

Power to punish for contempt. It was explained in the chapter on the structure and organization of Congress that each House has the authority to discipline its own members. In certain cases this authority may be exercised over outsiders as well. Either House may punish an individual who physically obstructs its business, who physically assaults a member for action taken in the House, or who prevents a member from attending to his duties.⁴² Of special importance is the power of either House to punish any person who fails to be present and give testimony, or who fails to bring papers and documents, when properly called upon to do so. Duly authorized investigating committees frequently have occasion to order witnesses to appear and give testimony, and the courts have held that they not only have the authority to issue such orders, but also the authority to impose punishment when the orders are not obeyed. Either House may impose the punishment, or the Congress may (it has in fact) by general law specify

⁴²*Marshall v. Gordon*, 243 U.S. 521, 542 (1917).

the punishment in such cases, leaving the courts the duty of applying the criminal statute to recalcitrant individuals.⁴³

C. Executive and Administrative Powers ⁴⁴

Share in appointing and treaty-making powers. It will be recalled from our discussion of the President's powers that the Senate shares with him two very important executive functions, namely, the power to give or withhold consent to appointments to office and to the ratification of treaties. We learned also that while the House of Representatives is given no share in the matter of appointments, individual members nevertheless are not without a voice in a number of instances. In like manner, the House has no constitutional part in treaty making; but many treaties require an act of Congress to put them into effect, and in such cases the House is in a position to make its power felt.

Power to prescribe executive and administrative duties. The powers and duties of the President are in a general way laid down in the Constitution; but, to a considerable extent, the nature of the President's work is determined by Congress. For instance, in the Civil Service Act of 1883, which placed a few thousand federal employees under the merit system, Congress gave the President the fundamental power of extending the merit principle to many more thousands of employees, a power which has been frequently used to the great advantage of the civil service. Again, Congress, through its powers to make laws respecting the postal service and foreign commerce, has authorized the President to make postal "treaties" and tariff agreements with foreign powers, such treaties and agreements in the individual cases to become effective *without* the advice and consent of the Senate. Taking another example, the very large responsibility of the President for the preparation and presentation to Congress of the national budget rests upon an act of Congress (1921). Illustrations could be multiplied almost without end, particularly from the broad grants of power made to the President by Congress in 1933, as indicated in the chapter on the President's legislative powers, but those just mentioned are sufficient to show how wide a field of presidential activity is opened up by Congress. Not only does Congress have a most important voice in determining the President's sphere of action, but its powers are even wider in respect to the executive departments and the other institutions of national administration. More will be said of this in a later chapter. Here we shall be content to notice that the great Departments of State, Treasury, etc., and the commissions, like the Interstate Commerce Commission and the Federal Trade Commission, were brought into existence by acts of Congress.

⁴³ J. M. Mathews, *The American Constitutional System* (1940), pp. 110-111.

⁴⁴ Haynes, *op. cit.*, Vol. II, Chs. XII-XIV; L. Rogers, *The American Senate* (1926), Ch. VI.

Detailed direction of administration. Writing in 1925, Carl Merz stated, "Congress hurries tirelessly from one administrative problem to another: from technical details of reforestation to causes of the hoof-and-mouth disease; from the right way to protect fish in Alaskan waters to the regulation of left-hand turns in the District of Columbia; from the proper temperature for a botanical garden to the loan of the Marine Corps Band for a centennial in Florida. It is a common practice nowadays for Congress to spend days debating such administrative questions as which guns shoot best, how long paints last, how mail tubes are operated, why somebody ought to be made a captain in the Navy."⁴⁵ A certain amount of regulation of administrative authority is, of course, necessary and desirable; but when legislative bodies concern themselves with administrative minutiae, they are likely to do more harm than good. Congress does not now concern itself so much with regulating by law the details of administration. Many members seem to share the view of Speaker Rayburn that Congress cannot administer the laws it writes nor manage the wars it declares. Much less can Congress incorporate the rules of administration and management in its enactments. During the First World War, the crisis years following 1930, and the Second World War Congress delegated authority to the President and other administrative officials in a most liberal fashion. Nor has this delegation of authority been limited to periods of emergency; they simply mark the high points of the practice.⁴⁶ Yet Congress, its committees, or individual members frequently take a hand in administration.

It is, of course, entirely proper for Congress to satisfy itself that the policies it fixes are carried out by administrative agencies in good faith. The appropriations committees have a regular opportunity to review the work of an administrative agency when it comes forward for funds. On occasion, appropriate legislative committees may "take a look" at the conduct of the agencies they have established. Individual members of Congress often bestir themselves over the administration of a law, the conduct of some agency, or the attitude of a particular civil officer. A congressman is likely to take action on the strength of a complaint from a friend or constituent, or from a newspaper report, or on the basis of his own observation. He may go first to the administrative agency against which complaint is made and try to get the matter corrected. Failing in this, he may report the situation to a committee, which may or may not take his view of the matter. And, finally, he may lay the case before the House of which he is a member.⁴⁷ It is fairly obvious that this sort of check on administrative officials and their employees is very likely to be based on isolated

⁴⁵ Quoted in Rogers, *The American Senate*, p. 196, from C. Merz, "Congress Invades the White House," *Harper's Magazine*, May, 1925, p. 643.

⁴⁶ On this delegation of power see Ch. 11, sec. V.

⁴⁷ Elias Huzar, "Congressional Control over Administration: Congress and the W.P.A.," *Am. Pol. Sci. Rev.*, XXXVI, 51 (February, 1942).

cases and personal considerations. As a means of holding administration accountable to Congress it is of little value. It is sporadic and capricious. Furthermore, there is better than an even chance that it will impair rather than improve administration.

Examples are frequent of congressional outcries against the most efficient administrators. Indeed, in final analysis the charge has often been that an administrator is too good: that he will not appoint to subordinate posts the political supporters of congressmen; or that he is hewing straight to the line and letting the chips fall where they will, not responding to the pressures of powerful individuals or groups to go easy on them. It is a matter of common knowledge that some of the best administrative officials have been forced to retire for no other reason than their resistance to unjustifiable pressure from congressmen and the selfish interests behind them.

Congressional investigations. A special method, but again a hit or miss one, by which Congress seeks to maintain a degree of control over administration is that of investigation. This power is not one specified by the Constitution but it is an indispensable part of the power to legislate. Consequently, investigations of any office or subject may be made, provided the investigation has some relation to possible legislation. Congress has resorted to sporadic but frequent investigations of official conduct. These investigations are more often undertaken by the Senate than by the House, for, as Professor Rogers points out, party control is so strong in the House that the leaders of the majority, if they are of the President's party, will usually prevent a proposal for an important investigation from coming to a vote.⁴⁸

Investigations are roundly condemned in many quarters as being launched for partisan, or even for personal, reasons; as interfering unduly with the executive departments; and as calculated to bring those departments and their officers into disrepute, or even disgrace. These criticisms are by no means groundless, and they are often made in good faith. But some individuals oppose investigations because they happen to approve of what is being done by the departments under fire; others, because they have good reasons to fear that investigation may disclose some very nasty conditions, not only in the public service, but also in certain private business closely connected with it; still others, because they believe "everything is all right" and do not see why we should not live in a permanent state of political tranquillity. Admitting the abuses of investigations, there are few informed persons who denounce them as unmitigated evils. Since the people's representatives have no other effective means for finding out what the departments are doing, one would be rash indeed to propose that the investigating practice be abandoned. These

⁴⁸ *Op. cit.*, p. 202. The New Deal has not, however, been able to hold such control over Democrats in the House. If it had, the Dies Committee would never have been appointed, certainly not continued.

congressional inquiries have frequently produced salutary results of a temporary, if not of a permanent, nature. To take just one good example, the Senate investigations of the oil and other scandals in 1924 resulted in the retirement of three Cabinet officers, several indictments, and a few convictions.⁴⁹ Of particular significance are the investigations of several committees on matters relating to the conduct of the Second World War (see Chapter 26, section II).

VIII. HOW CONGRESS MIGHT BE IMPROVED

What is the matter with Congress? Congress is frequently criticized and ridiculed by the press and by individuals, from leading industrialists and publicists down to the keepers of the smallest shops and the possessors of the dullest wits. An uninformed and boring speaker, finding the "going hard," may safely count on a laugh or applause when he hurls a sharp barb at Congress. The reasons for the criticism of Congress are many; some are justifiable and some are not. The economic and social interests of the country are complex and diverse. Congress offends one group and pleases another by passing or failing to pass a piece of legislation. By its next action or nonaction, it may offend the group which was pleased by its disposition of the previous issue, and please the group which was offended. When Congress has finished a session, each interest can probably find something in the list of enactments which represents a favor or concession to it; but it will be almost certain to feel that the matters dear to its heart have been passed over or lightly considered. Such is human nature that the failure of Congress to take care of a group's interest in one case will be remembered, while its consideration for such interest in another will be forgotten. Congress receives criticism, not only because it must of necessity disappoint many powerful interests, but also because the public does not understand the immensity of the task which confronts Congress and the conditions under which it must work. Furthermore, the public is much more likely to notice the antics and clowning of congressmen than it is to observe their statesmanship. This is perhaps explained by the fact that the bulk of the hard work of Congress is done in committee (this is particularly true of the House) and not on the floors.

In 1941 Professor Frederic A. Ogg, then President of the American Political Science Association, appointed a committee of scholars to study and

⁴⁹ Congressional investigations are often for other purposes than checking up on the administrative departments. One need only recall the various investigations of lobbying, banking, campaign expenditures, public utilities, munitions makers, etc. Such investigations are, broadly speaking, for legislative purposes. Occasionally they are for "political" purposes. The Dies Committee on un-American Activities although not constituted primarily to investigate administration agencies, has done so, probably for "political" purposes.

report on Congress. Its Second Progress Report is well worth attention.⁵⁰ The high spots of the committee's diagnosis are here summarized:

(1) The decline in the effectiveness and prestige of Congress reflects a trend toward strengthening the executive power. The trend is distinct in all representative governments, and it is caused by the great expansion and centralization of governmental functions and other conditions, a number of which are not under legislative control. To the extent, however, that Congress weakly yields to executive direction, the legislative branch is responsible for its minor place in the scheme of government.

(2) Congress finds it difficult to keep informed upon the operations of the administrative machine, and it does not avail itself of information that is available. Consequently, it is not well organized to exercise oversight of administration.

(3) Few congressmen take an over-all view of the interests of the country. The great majority represent their districts or states.⁵¹ They strive mightily to get appropriations for their particular areas, and some of them, in the face of claims of impartial observers that other locations were more desirable, have sought to have war industries established in their districts. Constituents keep their congressmen busy interceding with administrative officials, seeking commissions in the armed forces, attending to pension claims, and in performing various other personal services. Congressmen have been characterized as "Uncle Sam's" bellboys running a "popular chain store service" for their constituents. It is true that there are congressmen who give little of their own time to this type of thing, leaving it to their secretaries; but the typical politically-minded congressman spends a large part of his energy on it, believing, as does a former Speaker of the House and Vice President, John N. Garner, that such activities constitute a congressman's bread and butter.

(4) Congress has been criticized for not resisting the demands of agriculture, labor, and other special interests, and for voting itself annuities and engaging in "politics as usual." But, on the credit side, it may be said that Congress responded promptly to Executive requests for power and money with which to wage the Second World War.⁵²

(5) Although members, particularly members of the House, take their committee work seriously, the committee system is not well organized either for the purpose of oversight of administration or for the formulation of legislative policy. Several investigating committees are often created for the same or overlapping subjects, taking an unnecessary amount of congressmen's time and that of the administrators who must appear be-

⁵⁰ George B. Galloway et al., "Congress—Problem, Diagnosis, Proposals . . ." *Am. Pol. Sci. Rev.*, XXXVI, 1091 (December, 1942).

⁵¹ See "We Have No National Government," *Readers' Digest*, January, 1938.

⁵² On Congress and the war see Chapter 26, sec. II.

fore the committee. Various committees have been concerned with the conduct of the Second World War. Joint committees of the House and Senate might prove more efficient both as investigating and legislative committees.

(6) With a few exceptions, Congress has not taken the necessary steps to strengthen its research and staff facilities.⁵³ It must therefore rely upon administrative departments and private research agencies for this service. Other deficiencies and delinquencies of Congress were noted by this Committee of professors. Yet their diagnosis was not that Congress was on the verge of a general breakdown, but rather that it had developed dangerous symptoms in a number of particulars. The committee believes that "Congress still possesses essential deliberative and representative functions which no other group is equipped to perform so well."⁵⁴

Suggestions for improvement. The committee appointed from the American Political Science Association is of the opinion that three procedural changes would greatly improve the work of Congress and restore some of its lost prestige. The first procedural change suggested is that committee work be recognized as the heart of congressional activity. "Most of the days and most of each day of a congressional session should be legally and specifically devoted to committee meetings. Hearings, preferably joint hearings for concentration of attention, should be open to the public by card, as is now the Senate gallery, and should be recognized by constituents and sightseers as the way to see Congress at work. Rather than looking down at a forlorn performance before empty chairs, the public could choose between attendance at one or more parts of a twelve-ring committee circus where questions and arguments would be lively and real."⁵⁵

The House and Senate meet for only two main purposes, (1) to vote on measures and (2) to debate, not to change votes (seldom if ever is a vote changed by a speech), but to explain or justify their individual votes and to influence public opinion. Since this is true, why not greatly reduce the time for full sessions? The committee suggests that these functions could be performed in two or three evening meetings each week, one evening for voting and perhaps two for debating, the proceedings to be heard over the radio. The committee is realistic. Its recommendation calls for an adjustment with *Quiz Kids*, *Information Please*, and Raymond Gram Swing to avoid too much competition. Congress could put its best men in these debates and present the issues to the American people in an effective manner. Why should this type of congressional rostrum not hope to rival fireside chats, Town Halls, and University Round Tables?

⁵³ Of value both as to what has been done and what ought to be done is Lindsay Rogers' "The Staffing of Congress," *Political Science Quarterly*, LVI (March, 1941).

⁵⁴ *Op. cit.*, p. 1098.

⁵⁵ *Ibid.*

The committee's third proposal is that Congress take a recess for four days each month, during which time its members are to return to their constituents to explain national policies, laws, and administration and hear local opinion on the same. No other branch of the government has the representative character and therefore the members of no other branches of the government are in a position to perform this representative function.⁵⁶

A general suggestion for the improvement of Congress may be in order. Perhaps it is too broad to be useful, too idealistic to be attainable. The suggestion is not that congressmen cease being politicians, but rather that they try a new brand of politics; that they make the national interest, by deeds as well as by words, their political program; that they go before their constituents explaining their stand on national issues with vigor and clarity and, on occasion, with a cheerful note of defiance. The average decent voter would respond favorably to a representative or senator who puts the interest of his country above that of his state or district. Voters with special interests and claims would not, but they are seldom in the majority; besides, some of them would be big enough to support a courageous man who defies them. There have been, and are, men in Congress who have followed substantially the plan here suggested, and the percentage of them who have died still in their seats or voluntarily retired is quite as high as that of the district-serving, errand boy congressmen. The fact is that the typical member of Congress has assumed for so long that the only way to hold his place is by pandering to his district that he does not notice how many members who follow that course are repudiated by the voters, or that the few members who stand on national issues have, with an encouraging degree of frequency, experienced renewals of the voters' confidence.

For reading list, see references at the end of Chapter 13.

⁵⁶ At the end of the committee's report are a number of proposals and recommendations coming from individual members of the committee. Many of these proposals are worth attention. See also Robert Luce, *Congress—An Explanation*, Ch. V, and his "Petty Business in Congress," *Am. Pol. Sci. Rev.*, XXVI, 815 (1932).

State Legislatures



Having examined the structure, organization, and procedure of Congress, and having made a brief summary of its powers, we shall now make a similar study of state legislatures. Since these bodies are so similar to Congress in many respects, it is not necessary to discuss them at length. Our knowledge of the ways of Congress will make summaries, or even bare references, sufficient on a number of points. But where the state law-making bodies differ materially from Congress, and where for no good reason they resemble Congress, we shall have fuller discussions.

I. STRUCTURE ¹

Popular belief in the bicameral system. Nebraska is the only state without a bicameral legislature. If an individual who is not a student of politics thinks of the system at all, he thinks of it about as he does of a law of nature. It simply must be so. If one asks why there must be two chambers, the typical citizen probably regards him with mingled contempt and suspicion, and then speaks with that strong emphasis which comes from assurance: "Why, one house serves as a check upon the other. Either house might hastily pass some villainous bill; the other house will probably give the measure more consideration, defeat it, and that will be one more bad law that we won't have to bother with." If the inquirer is not made ashamed of his "ignorance" by this reply he might ask: "Why, then, should we not have three houses, or four? Certainly we have plenty of bad laws passed by the two houses. Maybe four houses, with all the checks they would provide, would succeed in checking out practically all the unwise bills." At this point the "informer" might become a bit irritated and say that every fool knows that there should be two houses, and just two; that they probably check each other as much as is desirable; that, in any case, the men who wrote the state constitution knew what they were

¹ *The Annals of the Am. Acad. of Pol. and Soc. Sci.*, CVC (January, 1938), various articles on state legislation by leading authorities; F. G. Bates and O. P. Field, *State Government* (1939 ed.), Ch. VI; W. F. Dodd, *State Government* (1928 ed.), Ch. VI; W. B. Graves, *American State Government* (1941 ed.), Ch. VII; A. N. Holcombe, *State Government in the United States* (1931 ed.), pp. 282-291; A. F. Macdonald, *American State Government and Administration* (1940 ed.), Ch. VII; J. M. Mathews, *American State Government* (1934 ed.), Ch. X.

doing when they gave the legislature an "upper" and a "lower" house, following the plan adopted by the Philadelphia Convention for Congress. At the mention of the fact that the states have the legislative system which the enlightened patriots in 1787 deemed sufficient for the needs of the national government, the inquirer is probably silenced. It is our duty to push the inquiry a little farther.

Why the bicameral system was adopted. The student knows, of course, that nearly all of the colonies employed the bicameral legislative system, patterned after the two Houses, Lords and Commons, of the British Parliament. Following the British and colonial models, nearly all of the state governments organized during the Revolution adopted the dual plan. In some of the states, the rank and file of citizens elected the members of the lower house, while the upper house was elected by the propertied classes. This distinction was never made in other states, and the states which adopted it soon gave it up and allowed the same electors to choose members of both branches of the legislature. Not only that, but, with a few exceptions, population came to be accepted as the basis of representation in the upper as well as in the lower house. There was, then, no essential difference between the two houses; and the main excuse for the two was that one would check the other, or, to put it affirmatively, that bills would be more carefully considered by two houses than by one. The framers of the Federal Constitution prescribed the bicameral system for the national government not only because past practice in Great Britain and America stamped it with approval, but also because it made possible the great compromise on representation—representation in the House of Representatives according to population, and in the Senate an equal representation of the states. The states were strongly influenced by the federal system, and those which started with the unicameral type of legislature abandoned it for the bicameral plan.² With only one dissenter, the states continue with the dual type of legislature. Yet it has been discovered in recent years that ideas can be changed rather quickly, and it may be that the Nebraska experiment will be tried in other states in the near future.

DO THE HOUSES CHECK EACH OTHER? Some studies³ have been made of the working of the bicameral principle, and these do not show that the two houses effectively check each other, except perhaps in a few states. True, a number of bills passed by one house are killed in the other; but the killing is usually indiscriminate. It is true, also, that one house amends many bills originating in the other; but, here again, the amend-

² Georgia (1789), Pennsylvania (1790), and Vermont (1836). See D. B. Carroll, *The Unicameral Legislature of Vermont* (1933), and I. A. Watts, "Why Pennsylvania Abandoned Unicameralism," *State Government*, March, 1936, pp. 54-55.

³ D. L. Colvin, *Bicameral Principle in the New York Legislature* (1913); Thelma I. Griswold, *Bicameralism in Ohio* (1937); Dorothy Schaffter, *The Bicameral System in Practice* (1929).

ing may be good, bad, or indifferent. Consideration by two houses often means only two hasty considerations, or simply a hasty consideration in the house in which a bill originates and the acceptance of its conclusions by the second house without any consideration. It is further charged that the bicameral plan enables party leaders or the "organizations" to control legislatures in an irresponsible manner. Here is an example. The public seems to want enacted a law which the leaders secretly oppose. The leaders have a different bill introduced and passed in each house. Then a conference committee, under the control of the leaders, of course, goes through the form of attempting to agree upon a measure acceptable to both houses. By previous arrangement the conference committee fails to agree, and no law is enacted. Nevertheless, by this subterfuge, both houses go on record as approving a measure which the leaders deftly beheaded.⁴ It would seem, then, that the bicameral system not only frequently fails to insure adequate consideration of bills and to accomplish the defeat of unwise ones, but also that it may be used as a means of dodging responsibility.⁵

MORE EFFECTIVE CHECKS. After all, whether or not the houses check each other is not a very material point; for legislation is checked by a number of other means which we deem quite sufficient. The committees of each house, although far from perfect, do a great deal to improve the quality of legislation by their preliminary studies of the bills introduced. The governor's veto, discussed in a previous chapter, often proves to be an effective guaranty against faulty legislation. Then, we must not forget the courts with their power to nullify unconstitutional acts. In particular, we must remember that the federal courts will void state laws which violate such important provisions of the Federal Constitution as the clause which prohibits the states from passing laws depriving any person of life, liberty, or property without due process of law, and the clause prohibiting the states from impairing the obligation of contracts. Considering that legislatures are held in check by these agencies, it hardly seems desirable that the bicameral check, usually fictional, seldom a positive good, and on occasion mischievous, should be retained.

The case for a unicameral legislature. With the foregoing considerations in mind, it is not surprising that many students of government advocate a unicameral system for the states.⁶ It is argued that this system will expedite the business of the legislature; prevent the leaders from dodging responsibility; and, by reducing the number of legislators, enable states to pay adequate salaries to those remaining. It is pointed out that the single

⁴ Holcombe, *op. cit.*, p. 307.

⁵ The typical member of the legislature usually stresses the value of the "checks" under the bicameral system, but several members have frankly told me that they need protection—the privilege of dodging responsibility.

⁶ See, "A Model State Constitution" (1941 ed.), prepared by the National Municipal League.

chamber has given satisfactory results in several Canadian provinces, in Swiss cantons, and in other countries. Advocates of the single chamber make a strong argument for it when they show that the cities have long since abandoned the bicameral council in favor of the single-chamber council. In 1936 the Irish Free State abolished its Senate.

Nebraska is willing to experiment. In several states, attempts have been made to secure the adoption of the unicameral principle. Constitutional amendments have been submitted in Oregon (1912 and 1914), Oklahoma (1914), and Arizona (1916); but they were defeated in each case. In 1913 Governor Hodges of Kansas proposed a single chamber, to be composed of less than a score of members, who should be experts in legislation and give their full time to affairs of state. His novel and interesting proposal was not submitted to the voters.⁷ Despite the fact that ten states gave thought to the unicameral idea between 1910 and 1934, Nebraska is the only state which adopted it. The proposal was brought forward in that commonwealth from time to time for twenty years and there is little doubt that it would have remained in the proposal state for another twenty years but for the fact that Nebraska's statesman, Senator George W. Norris, actively sponsored the unicameral plan in 1933 and 1934. Opposed by practically every newspaper of the state as "radical," "revolutionary," and "dangerous," the constitutional amendment was adopted by the voters in November, 1934—a proof of the Senator's power over his constituents.⁸ The amendment provides for a chamber of not less than thirty nor more than fifty members, and the legislature fixed the number at forty-three, to be chosen on a non-partisan ballot. The plan went into operation with the legislative session of 1937. A critical evaluation of it must be deferred for some years, but Nebraskans were encouraged to note the high type of representatives elected under the new system and pleased with the record they have established.⁹ Since 1934 the unicameral plan has been an issue in a score or more of states.

The size of the chambers. The number of state senators and representatives is rather rigidly fixed by the constitutions in some states; but in the greater number of states, the constitutions simply impose general limitations and leave the legislatures to determine the exact number. Senates vary in size from 17 in Delaware to 67 in Minnesota, with less than half the states having as many as 40. The lower houses are considerably larger than the senates, varying in size from 35 in Delaware to 427 in New Hampshire, but the number is usually somewhere between 100 and 150. Nearly all of the large lower houses are in the New England states, because the system of town representation, still in use there, necessitates a large num-

⁷ Carroll, *op. cit.*, pp. 4 ff.

⁸ J. P. Senning, "Nebraska Provides for a One-House Legislature," *Am. Pol. Sci. Rev.* (1935), XXIX, 69-74.

⁹ Senning, "Nebraska's First Unicameral Sessions," *Annals of the Am. Acad. of Pol. and Soc. Sci.*, CVC, 159 (January, 1938).

ber of representatives. It is generally agreed that the size of both the senate and the house is, in most states, larger than necessary. Despite this, the tendency is to increase the numbers; for when a reapportionment is made, either the communities which have not increased in population must lose representatives or those which have increased must be given additional representatives, and in our chapter on the structure of Congress we learned that, politically, it is much easier to take the latter alternative.

The basis of apportionment. For purposes of representation, the typical state is divided into two sets of districts—one set for members of the lower house, and the other for the upper house. The counties serve as convenient units for representation in the lower house in most of the states, except in New England, where the town is the unit. Counties usually have representatives in proportion to their population, but the general rule is that a county shall have at least one representative. Except in Maine and Massachusetts, the New England system of town representation pays scant attention to population, particularly in Vermont and Connecticut, the former state giving every town, regardless of size, one, and only one, representative, the latter allowing large towns a maximum of two representatives. Apportionment in the senate is usually on the basis of the population of the counties, although some of the New England states use the town as the unit, practically disregarding the difference in population. Small or sparsely settled counties may be combined to form a senate district, and densely populated counties may be divided into several districts. A few states (Illinois, for example) make use of the same district for senators and representatives. A state having 50 senators and 150 representatives would, under this plan, have one senator and three representatives from each district.

DISCRIMINATION AGAINST CITIES. As already intimated, there are exceptions to the general rule that localities are represented in the legislature according to population. Inequalities, sometimes amounting to gross discriminations, occur principally in those states which have large urban populations. Many authorities have discussed this problem, but this paragraph is based upon an article by Professor David O. Walter.¹⁰ In more than a majority of the states the constitutions favor the rural areas in the matter of legislative apportionment. In twenty of these states the composition of the senate favors the less populous areas, and in twenty-seven the rural communities are given the advantage in the lower houses. Furthermore, legislatures, dominated by representatives from the "cow counties" often fail to carry out the clear mandate of the constitutions to reapportion seats. The Illinois legislature, which has not made a reapportionment since 1901, is only one of the worst examples of this. In

¹⁰ "Reapportionment and Urban Representation," *Annals of the Am. Acad. of Pol. and Soc. Sci.*, CVC, 11 (January, 1938).

at least two dozen other states the legislatures have similarly failed to carry out the requirements of the constitutions. The courts are powerless to correct this situation because reapportionment is a political question—one over which the courts have no jurisdiction. The “rotten borough” system, the scheme under which sparsely populated areas are over-represented at the expense of the metropolitan communities, thus continues to flourish. Constitutional provisions relating to senates discriminate against Atlanta, Baltimore, Los Angeles, Providence and other cities, and the unconstitutional failure of legislatures to do their duty add to the list Chicago, Detroit, St. Louis, and other urban centers. In perhaps as many as twenty states urban populations have only about half the representation to which their population entitles them.

Reasons for discrimination. Originally, the states were predominantly rural and equal numbers of representatives from counties or towns, resulted in few gross disproportions. With the growth of cities, however, “equal” representation produced the inequalities noted above. In most states concessions were made to the urban areas by increasing their number of lawmakers; but the increase was almost never in proportion to population. Delegates in legislatures and constitutional conventions, regarding cities as full of irresponsible non-property owners, foreigners, and radicals, or even as cesspools of iniquity, and likely to disturb the political and social order if given the power to do so, used their original advantage of numbers and voted against making fair concessions to the urban dwellers. A statesman so broad of mind as Jefferson had the gravest misgivings when he contemplated the untoward political and social possibilities of urban electorates. Discrimination continues not only because many “good” people see it as a means of curbing excesses for which large representations from cities might be responsible, but also because it is to the economic and political advantage of those who have control under the present system to continue it.

Some results of discrimination. Rural populations and their representatives, despite certain populist tendencies, are essentially conservative on the great problems of the day; certainly more so than city people. This means that conservatism has more than its share of representation in the legislature. Whether or not this is a “good thing” depends upon one’s point of view; but it is suggested that we assume a great deal when we say that a farmer and his hired man are entitled to a voice in government equal to that of a banker, a clerk, and a factory laborer. Another consequence of this discrimination is that a number of states may find themselves with Republican legislatures and Democratic governors, the reason being that over-represented rural districts (outside of the South) are predominantly Republican, while the under-represented cities are more often Democratic. It is true that legislatures and governors of opposite political parties have, on occasion, established working relationships, but if they

are of the same political persuasion "the going" is usually smoother. One other point of significance should be mentioned. It is unfortunate that rural members of a legislature who understand nothing of the problems of municipal transportation, police, and similar complicated subjects have such a large voice in determining what shall be done about them. And it is as ridiculous as unfortunate that rural legislators should decree that there shall be no sports on Sunday, no Sunday movies, and no selling of cigarettes on any day of the week.

SHOULD REPRESENTATION BE DETERMINED ENTIRELY BY POPULATION? Despite the generally accepted principle that representation should be based on population, many students and public men argue for a modified plan. They say that there is more to be represented than numbers; that the various interests of the state should be represented as well; and that the interests of the rural sections will suffer if large cities containing over half the population of a commonwealth are given representation in that proportion in both houses of the legislature. A plan which gives such proportion in one house and limits representation in the other seems to meet with considerable favor. The criticism made above, referring to the grosser inequalities and discriminations, are not intended to be inconsistent with a plan of representation which would contain some restrictions on urban representation in one branch of the legislature.

Terms, qualifications, compensation, and immunities of legislators. About thirty states fix the terms of senators at four years; other states (except New Jersey, in which the term is three years), at two years. In the lower house the term is two years in forty-one states, and four years in four states, while New York and New Jersey, adhering seemingly to the theory of 1776 that "where annual election ends, there tyranny begins," still hold to the one-year term. Nebraska elects her single chamber biennially.

Senators and representatives must meet the requirements of citizenship in the United States, residence in the districts they represent, and age. These requirements are of no particular importance, as there is very little likelihood that any person with a chance of election would fail to have them in any case.

Compensation of state lawmakers is notoriously low. The amount is fixed in many state constitutions, and it has been found very difficult to secure the approval of amendments granting increases or granting the legislature the authority to make highly desirable adjustments.¹¹ Seven dollars a day for the period of the session is, perhaps, not far below the average compensation, and it is grossly inadequate. The only expense

¹¹ The people of Kansas have five times defeated a proposed amendment to increase the three-dollar-per-day allowance. A member of the legislature facetiously proposed that a log cabin dormitory be erected on the capitol grounds for the convenience of the lawmakers; that the cabin be equipped with wooden bunks; and that fresh, clean straw be supplied from time to time.

money ordinarily allowed the members is for transportation to and from the capital.

Just as congressmen do, state senators and representatives enjoy immunity from arrest while in attendance at sessions and in going to or coming from the same, except in case of treason, felony, or breach of the peace.

Again, as their national prototypes, they are accorded freedom of speech and debate in their respective houses.¹²

Personnel of legislatures. The composition of the typical state legislature bears a strong similarity to the personnel of Congress. Many lawyers are present, often relatively young lawyers who experience no particular difficulty in getting away from their few clients for the session and who lose no large volume of income in so doing. In fact, experience in the legislature may improve the professional status of the young attorneys and bring them more clients and larger fees. Next to the lawyers, the farmers, many of them well along in life, have the largest delegations. Then there are merchants, manufacturers, bankers, clerks, real estate men, salesmen, professional politicians, demagogues, and political "accidents." They are all there, good, bad, and indifferent. In their qualifications for their duties they rise well above the general run of voters who sent them to the capitol, and their unselfish devotion to the public interest may in like manner exceed that of the electorate. The number of women serving in legislatures now varies from 125 to 150, numbers not sufficient to produce any marked changes in legislation, even if women's interests were markedly different from those of the men.

The turnover in legislative personnel is very high, too high. It is often said that a member must serve in three sessions before he can hope to become effective. Professor Charles S. Hyneman has made studies of the turnover in a number of states, and his figures show that in only one fifth of the chambers studied are there majorities who have served for three sessions. In one third of the chambers he found that less than one fourth of the membership had served as many as three sessions.¹³ It may be that the three-sessions test is too high, but the figures do reveal a constant and strong flow of experienced members from the legislative halls which does not augur well for any improvement in the legislative process. Yet it is encouraging to note the regularity with which certain mature members (admittedly the number is far too small) with no particular axe to grind are regularly re-elected. Practically every college student can name legislators in his own state who serve unselfishly and ably, term after term.

¹² *Book of the States*, published biennially by the Council of State Governments, contains many facts and figures.

¹³ "Tenure and Turnover of Legislative Personnel," *Annals*, CVC, 21 (January, 1938).

Do legislatures represent? It is often said that, broadly speaking, legislatures are fairly representative of the larger economic and social groups. Although few of the lawmakers carry union cards or have other direct affiliations with labor, it is stated that other voices are frequently raised on behalf of labor. There is no doubt that business and agriculture are directly and well represented in the legislature; it is certain that labor, both industrial and agricultural, and some other economic and professional groups are not directly represented, and it is debatable whether they are fully represented by legislators who have their life among other interests and organizations. In any event, it may be argued that legislatures as now constituted are not truly representative of the many interests of the whole population of a state. This is explained in part by the fact that legislators are commonly chosen by single-member districts. It is, of course, impossible for more than one to be chosen from such a district, and this means that those of the minority party, even though they may number just a few less than the majority, go unrepresented as far as that particular district is concerned. Where there are three parties in a district, it is possible for a candidate to win who has only thirty-four per cent of the votes, thus leaving sixty-six per cent of the voters unrepresented.

PROPORTIONAL REPRESENTATION. In order to give the parties fair quotas of the representatives, plans of proportional representation have been proposed. In one form or another, "P.R." is now employed in a number of European countries and in a few American cities. Without going into technicalities,¹⁴ we will simply say here that, if applied to the election of members of the lower house of a state legislature, it would mean that our single-member districts would give way to large districts, each sending some half a dozen members to the lower house. The votes would be cast and counted in such a way that parties or groups which cast one third of the votes in the district would elect one third of the representatives, and other parties or groups would in like manner receive their fair proportion of the representatives. Of course it would never give the parties representation in strict mathematical proportion to their voting strength, but proportions would be approximately fair—much fairer than under our present system.

Objection to P. R. Nevertheless, the principle of proportional representation does not meet with any particular enthusiasm in this country. It is argued that, by giving smaller third parties an opportunity to elect their candidates to office, our two-party system, in which we take so much pride and in which we place so much reliance, will be disrupted. With this development, it is feared that frequently no party would have a majority in the lawmaking body, and that we would have to resort to a

¹⁴ There are a number of books and articles which fully set forth the details. C. G. Hoag and G. H. Hallett, Jr., *Proportional Representation* (1926), covers the field thoroughly.

"*bloc*" system of government, the working of which in Continental European countries has not favorably impressed us. It is said further that, as between the two major parties, the present system works out with reasonable fairness in the long run; that disproportions favoring a party in one district are equalized by disproportions favoring the other party in another district. This, however, is taking some liberties with the facts. A party with a majority will almost invariably win more than its fair quota of seats under the present arrangement. While admitting this to be true, the advocate of party government will nevertheless say that the majority party needs this extra "unearned" majority in order to carry out its program. Conceding that there are certain very clear, if somewhat theoretical, advantages on the side of proportional representation, the exigencies of practical politics relegate it to the background. After all, it can hardly be said that the unfair representation of parties in legislative bodies constitutes a major problem in state government.

Legislative sessions. The matter of legislative sessions demands brief attention before we leave the subject of legislative structure. Nearly all the states are now content with biennial sessions. New York and four other states still hold annual sessions, and Alabama is alone in her plan of holding regular sessions quadrennially. In about forty states, the legislatures convene in regular session in January of the odd year. The time they may remain in session is stipulated in the constitutions of about three fourths of the states. Sixty days is the limit fixed in the majority of these states. Sometimes, on account of the mass of business to be dispatched on the last few days, the clocks are turned back or are officially ignored until the work has been finished.

SPLIT SESSIONS. California and several other states have tried the experiment of split sessions. By the California plan, the legislature meets for not more than thirty days for the purpose of the introduction of bills and the disposition of certain preliminary matters. Then it must take a recess for not less than thirty days, the assumption being that during this period the members will mingle with their constituents and learn their will on pending legislation. When the legislature reassembles, no new bills may be introduced in either house without the consent of three fourths of the members thereof, and no member may introduce more than two bills. Split sessions have not demonstrated their utility to such an extent as to induce other states to follow the plan. In states which place no constitutional limit upon the length of sessions, a device known as the "adjourned" session is sometimes resorted to. Thus, the Ohio legislature, with a Republican majority, has adjourned several times for long periods, in order to prevent a Democratic Governor from appointing men of his own party to administrative offices held by Republicans whose terms have expired.¹⁵

¹⁵ Dodd, *op. cit.*, pp. 166, 168.

SPECIAL SESSIONS. Special sessions of the legislature may be called by the governor in practically every state, and in a few states the members of the legislature may demand a special session. More than half the states limit the legislature as to the matters it may consider in a special session, the common limitation being that no topics other than those proposed by the governor shall be considered. Such sessions have not been common except in recent "depression" years. On several occasions, governors have been impeached at sessions which they themselves have called. Fearing a hostile legislature, Governor Bilbo of Mississippi (1931) refused to call a much-needed special session unless the majority of the legislators would sign a pledge not to institute impeachment proceedings against him or other executive officers. Scorning the pledge as dishonorable, four leaders of the legislature called an *unofficial* session in the expectation that the governor would feel the necessity of legalizing it by issuing a pre-dated call. The governor's reply was that only a fool would travel to the state capital at his own expense, and he requested the lawmakers to calculate the cost of such a trip and mail him a check, which he would use to complete the Juniper Grove Baptist Church. "In this way," said he, "you'll help the Lord instead of the Big Four to play politics."¹⁶ This comic opera proceeding is reported not only because it illustrates one of the problems of the special session, but because it serves as an example of those unfortunate and all too frequent occurrences which bring ridicule and contempt upon state governments and officers.

II. LEGISLATIVE ORGANIZATION AND PROCEDURE ¹⁷

The speaker. The lower house in every state is presided over by a speaker. Theoretically he is chosen by the members, but actually by the caucus of the majority party—the caucus, in turn, being controlled by a few leading members of the party or even by a party boss who may not have a seat in the legislature. Occasionally the leaders of the two parties reach an understanding concerning the speakership, and in such cases the presiding officer is somewhat limited as to the extent to which he may use his office for the advantage of his own party. In the typical state, the speaker is more powerful than his counterpart in the national House of Representatives. Professor Holcombe summarizes his powers as follows: ¹⁸ the power to recognize (and, of course, to refuse to recognize) members who wish to be heard on the floor; to make rulings on points of order, subject to an appeal to the whole body of members—which appeal

¹⁶ *Time*, May 4, 1931, p. 14.

¹⁷ *The Annals*, CVC (January, 1938); Bates and Field, Ch. VIII; Dodd, *op. cit.*, pp. 178–190; Graves, *op. cit.*, Chs. VIII, IX; Holcombe, *op. cit.*, pp. 256–271; Macdonald, *op. cit.*, Ch. VIII; Mathews, *op. cit.*, pp. 249–280; C. I. Winslow, *State Legislative Committees* (1931).

¹⁸ *Op. cit.*, pp. 294–296.

is usually ineffective, owing to the fact that the majority ordinarily sustains the speaker; to appoint committees—through which power he rewards and disciplines members, and largely determines the character of party leadership in the house; to refer measures to committees—a power which often enables him to determine the fate of important bills; to control the committee on rules—a power which does not exist in all legislatures, and which is important only in those in which the rules committee is a highly privileged one. In controlling the house, the speaker relies very heavily upon the majority floor leader, particularly for making the necessary motions and explanations at the proper moments to enable the party to manage the house.

The presiding officer of the senate. In about three fourths of the states there is a lieutenant governor whose duty it is to preside over the senate. He is elected by the people, and he may even belong to the minority party. Not being a member of the senate, he ordinarily has no vote except in case of a tie. As presiding officer, his powers are similar to those of the speaker of the lower house, with the important exceptions that he usually has no power to appoint committees or to control the committee on rules. The majority party in the senate elects a president *pro tempore*, who presides in the absence of the lieutenant governor, and who, with other party leaders, exercises at all times the important political powers which fall to the speaker in the lower house. Under ordinary circumstances, therefore, the leading figure in the senate is not the lieutenant governor, but the president *pro tempore*, or some other majority party leader or leaders. In those states which have no lieutenant governor, it is, of course, the senate's privilege to elect its presiding officer, and in such states his powers are likely to be very similar to those of the speaker of the house of representatives.

Other legislative officers and employees. Each house elects a clerk, a sergeant-at-arms, a doorkeeper, a chaplain, and a postmaster. Numerous secretaries, stenographers, policemen, and pages are elected, or designated by leaders, and a few may even be selected by the rank and file of members as their part of the legislative "spoils." Frequently, legislatures have many more employees than they need, and their salaries and wages may amount to \$50,000 or even \$100,000 per session.

The committees. Each house of the legislature must have its committees, for the same reason that Congress must have them, in order to take care of the volume of work to be done. As noted above, committees of the lower house are commonly appointed by the speaker, after consultation with party leaders, or they may be agreed upon in the party caucus. The floor leader and other influential members of the minority party are usually allowed to designate their party's quota on the various committees. In the senate, committees are commonly chosen by the whole body upon the recommendations of the leaders of the majority party, or appointed by the

president *pro tempore*. Nearly all legislative bodies have more and larger committees than necessary. Thirty or more committees, with each member sitting on a half dozen or so, are not uncommon. There seem to be two reasons for this: first, members wish to increase their importance with their constituents by a chairmanship or two and by service on a number of committees; and second, leaders find it easier to control legislation if the work is made complex by dividing it among many committees and subcommittees. Some committees seldom meet, because they have little or nothing to do; others are overworked and have difficulty in finding time for their necessary meetings.

JOINT COMMITTEES. In three or four states much use is made of joint committees—committees composed of members from both houses. Massachusetts, which has developed the joint committee system further than any other state, has about thirty such committees.¹⁹ Under the regular committee system, each house has its own committees, which consider the bills and make their reports thereon; whereas the joint committee system requires consideration in committee only once, and the same reports are made to both houses. Furthermore, while the separate committees frequently lead the houses into passing conflicting measures, the joint committees have a decided tendency to hold them to a unified program. In further argument for the joint committee, it is often stated that the consideration such a committee gives a bill is much more complete and careful than the double consideration by a separate committee of each house. Despite these clear advantages of the joint committee system, other states appear to be in no hurry to adopt it.

The caucus. In the states, the caucus is likely to function in the matter of determining the officers of the legislative bodies,²⁰ and it may have some influence in fixing the personnel of committees; for it is to the interest of the party to have control of the organization of the legislature. But the caucus has little to do with mapping out or pushing through a legislative program; for legislation in the states is largely nonpartisan in character, and party lines are broken much more frequently and completely than in Congress. Party lines in state legislatures are usually artificial. The division in legislatures is quite as likely to be "left wing" vs. "right wing" as it is to be Republican vs. Democrat. Sometimes the leaders of the two

¹⁹ Luce, *Legislative Procedure*, p. 128; Graves, *op. cit.*, pp. 253, 259.

²⁰ A very estimable lady with little knowledge of the ways of caucuses was elected to the lower house of a state legislature. Her party caucus endorsed by a very small majority a candidate for speaker who was not acceptable to her, and she had no intention of voting for him in the house. Before the vote was taken, however, she learned that the vote on the caucus nominee for speaker was an acid test of party allegiance. Quickly smothering her conscience and summoning her party loyalty, she voted for the nominee, who was easily elected speaker, since his party had a large majority. While the lady was hoping that nothing like this would happen again soon, the clerk appointed her on the committee to conduct the speaker-elect to the chair! Her lessons in practical politics were coming fast.

parties ostensibly in opposition, reach an understanding, not only with regard to measures which shall be passed or defeated, but also in the matter of officers, committees, and employees. Such bipartisan combinations have produced some of the worst examples of corruption in state affairs.

The introduction of bills. Bills are introduced by individual members or by committees. The great majority of them are presented by individual members, and the overwhelming majority of these relate to some matter which is of interest only to the individual who introduces it, or to his constituency, or to a few voters in his constituency. Many such bills are introduced "by request," which notation on the bill indicates to the committee to which it is referred that the measure may be allowed to die in committee for all its ostensible sponsor cares. Important bills usually emanate from the powerful committees, and a number of these originate with the governor and are proposed by the committee as "administration measures." In order to give the legislature opportunity to consider the measures before it, a time limit on the introduction of bills is fixed by the constitution or by legislative rules in some states. This limitation usually takes the form of prohibiting introductions after the legislature has been in session a specified number of days. It cannot be said that these provisions are particularly effective; for certain types of bills are ordinarily exempted from the prohibitions, and others may usually be exempted with the consent of special majorities of the members.

Bills in committee. Upon the introduction of a bill, it receives its first reading by title only. The bill is then referred to a committee, and the committee considers it or does not consider it, very much after the manner of a congressional committee. In a few states, Massachusetts being the leading example, all bills must be reported by the committees. But in the great majority of the states the committees may kill measures by failing to consider them or by not reporting them after consideration. True, it is ordinarily provided that the majority of the house may recall a bill from a committee; but since the important committees are invariably controlled by the majority leaders, whom the rank and file of the party membership cannot afford to offend, this power to "discharge a committee," as it is technically called, is seldom exercised.

The common practice, then, is for the chairman and the majority of a committee to select for consideration only such bills as meet with their approval, and to report to the house only the bills which they want enacted into law. In making these selections, the chairmen of the committees usually keep in close touch with the speaker of the house, or, in the case of senate committees, with the president *pro tempore* of the senate. Occasionally, bills are reported unfavorably; but, as we have just noted, bills which are not favored by the committee are usually not reported at all. Measures which are reported favorably have a good chance of passage; those reported unfavorably and those not reported have practically no

chance. Thus, the committees, "little legislatures," working with the party leaders, have the power of life and death over the great majority of the bills which are referred to them. This is not an unmitigated evil; for, if a house considered all the measures introduced in it, the time required would be longer than the majority of the legislatures are permitted to remain in session. Besides, many of the bills deserve no consideration, and in a number of cases their sponsors intend that they shall have none, their sole purpose in introducing them being to placate some organization or individuals having political influence.²¹

Bills before the house. When a committee reports a bill favorably, it is ordinarily placed on the house calendar and is ready for its second reading. This reading is in full or by title only. In any case, the reading is of no importance except that it indicates a stage in the advancement of the bill. It is at this time that debate on a bill ordinarily takes place, amendments are offered, and strategy for defeating it brought into play. At this stage important bills are often considered in committee of the whole, which, as we have learned, is simply the house sitting informally. In committee of the whole there is opportunity for general debate, but the time is limited. When the house is in formal session, there is comparatively little debate, because of the pressure of time and the fact that the leaders often have other reasons for wanting the matter disposed of with little or no debate.

When a bill has passed its second reading, it is then engrossed. This may amount to a redrafting in some cases, depending upon the amendments and changes agreed to during the second-reading stage. Engrossed bills are placed on the calendar for third reading and are taken up for consideration in the order of their appearance, unless, as is often the case with important bills, they are made the subject of a special order. Debate on third reading is ordinarily confined to the bill as a whole, not to its parts, and amendments must have unanimous consent. With the conclusion of the debate on third reading, the bill is up for final passage, and the yeas and nays on this question must be recorded in the house journal.

TIME-SAVING DEVICES. State legislative bodies save time and rush bills through which the leaders do not want debated, in very much the same manner as our national House of Representatives. We take a few examples. The time a member may spend in debate is ordinarily limited by the rules. The presiding officer may refuse to recognize a member who wishes to speak. The "previous question" may be ordered, which means that debate must cease and the main question be voted upon. In many states the committee on rules brings in special rules from time to time, making a bill a special order on a given date, limiting the time that may be spent in debate, or setting the time when the final vote shall be taken. In no state is there that freedom of debate which is such a marked

²¹ Mathews, *op. cit.*, pp. 260-261.

feature of procedure in the United States Senate. State lawmakers may object to these timesaving and often "steam-roller" devices, but it is seldom that the majority will stage a protest; for the lowly member must follow the leaders, or he will have no share of the legislative patronage and no consideration will be given to the measures he proposes.

The conference committees. When a bill has passed one house, it must be sent to the other, where it runs the legislative gauntlet a second time. If the second house amends the bill, it must be returned to the first house for action upon the amendments. In case the two houses cannot agree on the amendments, the conference committee, noted in our section on congressional procedure, comes into play. The conference committees of the state legislatures have the same rather arbitrary powers we found them exercising in Congress. A conference committee may disagree quite honestly, or it may fail to agree because the leaders find in it a convenient means of defeating the will of the members of both houses. In any case, failure of a committee to agree means that no bill will be passed. On the other hand, it may add some entirely new provisions to a measure and thus secure what the leaders were not otherwise able to get from the legislative bodies. When a bill has finally passed both houses, it is sent to the governor, whose powers of approval and veto were discussed in Chapter 12, section III.

Procedural defects and suggested remedies. From the foregoing discussion, the student has no doubt gathered that legislative procedure is not all it should be. We shall attempt here to examine briefly some procedural defects, and, as far as possible, to suggest remedies.

1. **SECURING INFORMATION.** Those who follow the work of state legislatures often speak of their lack of information on the subjects upon which they legislate and of their lack of knowledge as to where information can be obtained. Information is needed not only on the subject with which proposed laws are to deal, but also on the type of laws which will best accomplish the purpose. Other states in the Union and legislative bodies of other countries have rich treasuries of experience from which any state legislature should draw; but all too often the information is not at hand or not in convenient form, so that our lawmakers are likely to listen to advocates who have a very personal interest in proposed measures. The advocate is present and eager to "help"; the hard facts may be hidden away in uninviting volumes.

The lobby. The lobbyist is therefore ever present and frequently is the sole authority on which legislators base their opinions.²² Of course lobbyists have a right to be present and to state the case for this or that interest or group; but it is not in the public interest that lawmakers, so often lacking information from unbiased sources, should rely upon them so heavily. The lobby is probably more powerful and sinister in the

²² See the articles on Lobbies and Pressure Groups in *The Annals*, CVC (January, 1938).

average state legislature than it is in Congress; for the searchlight of publicity is not so glaring and the legislators are perhaps not so able or so free from undue influence as congressmen. A number of states attempt to regulate the lobby by requiring lobbyists to register, state the firms they represent, and the bills in which they are interested. This is perhaps as far as it is safe to go. No attempt is made, or should be made, to abolish lobbying. As long as there are powerful individuals and groups with interests at stake before a legislature there will be lobbying, legal or illegal.

More reliable information is being made available. The remedy is not in a futile attempt to abolish lobbying, but in placing information from unbiased and scientific sources at the disposal of legislatures. This is done in part in every state through committee hearings, but here again the testimony is likely to be biased. The most promising remedy is found in legislative reference bureaus. The establishment of a legislative reference library by Wisconsin in 1901 was the signal for other states to do the same, until now more than forty of the states have them operating with varying degrees of success. In the few states in which these organizations are functioning effectively, they are constantly collecting information on all subjects likely to be of interest to the lawmakers, and during the sessions a staff of workers is on duty day and night to assist them.²³ Since 1925 a promising organization, the American Legislators' Association, has conducted researches, arranged regional and national conferences for legislators, and in various other ways extended a helping hand. In 1935 a more pretentious and inclusive organization, the Council of State Governments, was formed. It serves as the secretariat for the Legislators' Association and other organizations designed to improve state government. Its monthly publication, *State Government*, contains much useful material in readable form. Still other aids to legislators are found in technical studies conducted by such organizations as the American Law Institute, the Brookings Institution, the National Institute of Public Administration, and the American Society for Public Administration. The Library of Congress has prepared an index and digest of state legislation which is most serviceable to legislators.²⁴

2. DRAFTING BILLS. Legislators have been sadly deficient in the art of drafting bills. It is one thing to decide that a law is needed to prevent or encourage a particular thing, and quite another to draft a statute which will accomplish the purpose intended. Drafting is a technical matter. The statute must be so constructed that neither more nor less than is intended is expressed; that its meaning not only may be understood, but cannot be misunderstood. Some will seek to expand the terms of a statute;

²³ E. E. Witte, "A Law-Making Laboratory," *State Government*, April, 1930, and his "Technical Services for State Legislators," *Annals*, CVC, 137.

²⁴ C. A. Beard, *American Government and Politics* (1939 ed.), pp. 568-569; Graves, *op. cit.*, pp. 754 ff.

others will seek to make it meaningless. A law which serves the original purpose of its makers, despite all the controversy and litigation over its meaning, is a rare product. It is obvious that the average member of a state legislature is wholly incapable of drafting a bill in the proper form; for many of them not only lack the technical knowledge necessary, but they are also deficient in the rudiments of ordinary English composition. The bill-drafting follies of legislatures are often illustrated by an extreme example: "When two trains approach each other at a crossing they shall both come to a full stop and neither shall start up until the other has gone." ²⁵ Lacking the qualifications of bill drafters, many legislators rely upon lawyer constituents or upon lobbyists who are only too glad to frame statutes embodying the principles for which they are laboring. A few members, of course, are skilled in the technicalities of statutory craftsmanship, and they may not only draft their own bills but sometimes aid their colleagues and organizations or individuals who want measures drafted and introduced. Indeed, there are persistent rumors that some legislators skilled in bill drafting have received substantial sums from outsiders for whom they exercised their talents. For the average member of the legislature who knows few of the intricacies of statute making, more than half the states have provided help in the form of bill-drafting agencies in connection with legislative reference libraries or similar bureaus.

3. COMMITTEES. We have already noted that the typical legislature has too many committees, a situation which complicates, rather than clarifies, legislative work. There are no good reasons, other than political, for not materially reducing the number. Furthermore, the two sets of committees, one from each house, mean duplication of work; and in their hurry, committees of both houses often do superficial work. In Massachusetts, Connecticut, and Maine joint committees do practically all of the committee work, and their demonstrated usefulness should lead to their adoption in other states. It is often said that in the majority of the states the committees are not the servants of the legislature, as they are supposed to be, but its masters. Rules prohibiting the reference of more than a specified number of important bills to any one committee and requiring committees to report within a specified number of days any bills referred to them, would doubtless help in restoring committees to their proper spheres as servants. Hearing reports on all bills would require more time than most legislatures now have at their disposal; but electric voting devices, as used in the Wisconsin legislature, can save a great deal of time. A few legislatures have rules similar to those just mentioned, which give them control of their committees, and the satisfactory results obtained remove our recommendations from the realm of the academic.²⁶

4. END OF THE SESSION RUSH. Professor W. F. Dodd gives special atten-

²⁵ Bates and Field, *op. cit.*, p. 202.

²⁶ *Ibid.*, p. 212; Holcombe, *op. cit.*, pp. 296-298.

tion to the great rush which, unfortunately, characterizes legislative procedure in the closing days of the session in nearly every state.²⁷ In the near panic of the last ten or twelve days of a four or five months' session, the Illinois Legislature may pass more than half of its measures, while Pennsylvania, New York, and many other states may equal or beat that record. This is the time for the making of indefensible legislative bargains; the time when members are weak and weary, and even the more conscientious ones have relaxed their vigilance; the time when the steam roller works best. Some meritorious measures are enacted, of course, but so are others of much less merit; a few may be positively vicious; and it goes without saying that many good measures may be passed over. A goodly number of members vote as they are told, and hope that by so doing their own bills will be favored. There is no time to think, even if one is not too fatigued to do so.

One might assume that the rush is caused by the constitutional limitations as to the time legislatures may remain in session; but the three states just mentioned, as well as a number of others, have the rush without the time-limit excuse for it. The lawmaking hemorrhage near the end of the sessions is due primarily to ineffective procedure, and secondarily to the fact that the days of so many legislatures are constitutionally numbered. The chief remedy, then, can be found in improved procedure, and here again Massachusetts points the way. Practically all bills are introduced in her legislature in the early days of the session; the committees must report before a given date; and committee reports are promptly considered by the house in which they are made. In some states the Massachusetts system or something approaching it would call for that anathema to many Americans, an extension of time for legislative sessions; but the results we have reason to expect would justify it.

What the experts recommend. *The Model State Constitution* (1941 ed.), drafted by a Committee of the National Municipal League, contains several proposals on legislative procedure which are worth careful consideration.

(1) The unicameral system—the advantages of which have already been discussed—is recommended. The committee realizes, however, that the bicameral idea has professors and reformers on one side and “practical” men (whose conception of government hovers around 1787) on the other; and that the bicameral system is likely to continue to prevail in most of the states for some time to come. Consequently, the committee urges the states which want to retain the two chambers to reduce the membership in both houses, establish more equitable systems of apportionment, set up joint legislative committees, and create legislative councils. Such

²⁷ *State Government*, pp. 186 ff. Although Dodd made his observations some years ago, there have been no substantial improvements since.

states would then gain most of the advantages the Model Constitution offers.

(2) The Model would require committees to keep journals of their proceedings as public records; would authorize one third of the members of the legislature to relieve a committee of further consideration of a bill when the committee has not reported on it; and would require that notice of all committee hearings, with a statement of the subjects to be considered, be published one week in advance of the hearings.

(3) The Model provides for a legislative council consisting of not less than seven or more than fifteen members, chosen by and from the legislature. The legislature may dissolve the council at any time and elect a new one. The council is to meet as often as may be necessary to perform its duties, and its members are to receive compensation in addition to their stipend as members of the legislature. "It shall be the duty of the council to collect information concerning the government and general welfare of the state and to report thereon to the legislature. Measures for proposed legislation may be submitted to it at any time, and shall be considered, and reported to the legislature with its recommendations thereon. The council may also recommend such legislation . . . as in its opinion the welfare of the state may require. Other powers and duties may be assigned to the council by law. The legislature may delegate to the council authority to supplement existing legislation by general orders. No such general orders shall be effective until published as provided by law." Thus reads the Model. Since 1933 about ten of the states—Kansas, Maryland, Nebraska, and Illinois, among others—have established legislative councils, although in no state is the council given quite as much range as in the Model. Several states, including Connecticut and Virginia, have councils in which the executive has a voice. As a matter of fact, the earlier editions of the Model Constitution gave the governor a place in the legislative council. The weight of authority now, however, seems to favor allowing the legislators to have full control of the council. The fundamental duties of the council are to assemble information for and propose legislation, or alternative legislation, to the next session of the legislature. Where the councils are served by a technical and research staff, as in Kansas, the degree to which these functions are realized is very encouraging.²⁸

(4) The architects of the Model Constitution would make the legislature a continuous body during the biennium for which its members are elected. It provides for quarterly meetings and such other meetings as may be prescribed by law, and authorizes special sessions at the call of the governor or the majority of the members of the legislative council.

²⁸ F. H. Guild, "The Development of the Legislative Council Idea," *Annals*, CVC, 144; Graves, *op. cit.*, 329 ff.

This proposal is probably further from adoption by the states than is the unicameral system. The voters have the gravest suspicions of legislatures and the best news they hear about them is that they have adjourned. To be sure, some of the popular distrust of lawmakers is justified, but we can hardly hope to improve their personnel and output by opposing propositions designed for those ends. The basic difficulty is that too many of us still think of government in negative terms—that that government is best which governs least—a conception which has no relation to present-day functions of government and which is almost certain to defeat any proposal for improvement in the discharge of those functions.

III. LEGISLATIVE POWERS AND LIMITATIONS ²⁹

We have learned long ago that all of the powers of the national government are delegated to it by the Constitution or are implied from those delegated by that instrument, and that all other powers of government are reserved to the states, subject to a few important prohibitions laid upon them by the Federal Constitution. The states thus have jurisdiction over a much wider range of subjects than has the government of the United States. Each state, through its constitution, determines in the main what its governing authorities shall be, what powers they shall have, and, to a considerable extent, how these powers shall be exercised. In this division of powers within a state, the legislature always receives the lion's share. It elaborates the constitution through the enactment of innumerable statutes with respect to the functions the state shall undertake, what officers shall perform them, and how they shall perform them. Executives, administrative officers, and judges find most of their authority in the acts of the legislature.

Powers essentially legislative. Professor W. F. Dodd summarizes those powers which he regards as strictly legislative as follows: ³⁰ *First* in importance is the power to pass all revenue and appropriation bills. *Second*, all the machinery of government, except that which is provided for by the constitution, must be established by the legislature. *Third*, the legislature must enact the laws regulating the organization and powers of local governing bodies in cities, counties, and other local areas. Some states grant a measure of independence to such areas, but in only a few states is this local liberty of action sufficient to relieve the legislature of significant responsibility for local communities. *Fourth*, the legislature passes laws designed to regulate the relations of private individuals in such matters as contracts, deeds, mortgages, wills, marriages, divorces, and a host of

²⁹ Bates and Field, *op. cit.*, Ch. VII; W. F. Dodd, *op. cit.*, pp. 173-177, 190-222; Graves, *op. cit.*, pp. 293-298; Holcombe, *op. cit.*, pp. 275-288; Macdonald, *op. cit.*, pp. 163-167; Mathews, *op. cit.*, pp. 242-249.

³⁰ *Op. cit.*, pp. 173 ff.

other particulars. It protects individuals and the general public through the passage of acts defining and specifying the punishment for such crimes as murder, burglary, robbery, arson, and scores of lesser offenses; and it further looks after the safety and convenience of individuals by enacting such laws as those pertaining to motor vehicles.

Looking at the subject more broadly, we may say that the legislature very largely determines the policies of the state and the manner in which they shall be carried into execution. What system of taxation shall be employed? What highway program shall the state undertake? What educational advantages shall it offer its people, young and old? Shall child labor be prohibited? Should a workmen's compensation system be adopted? To what extent should labor unions be regulated? How much social security can the state afford? These and dozens of similar questions of the utmost importance must be decided by the legislature.³¹

Judicial powers. All state legislatures have some powers which are not legislative in character. In about half the states, the legislature is authorized to decide contested elections, a power which is judicial (or should be) in its nature and from which there is no appeal from the legislative decision. In all states except Oregon,³² the governor and other civil officers may be removed by impeachment. As in the national Congress, the "articles of impeachment" are voted in the lower house and the trial is conducted by the senate, except in Nebraska, where the articles are voted by the one-house legislature and the trial is conducted by the state supreme court. It will be made clear in the chapter on the State Judicial System that the courts not only look to the legislature for the laws which they enforce, but also find that their organization and procedure is fixed by the legislature.

Executive and administrative powers. Quite commonly the governor's appointments must be validated by senatorial confirmation, and in several states certain judicial and executive officers are chosen by the whole legislature. Ordinary removals (to be distinguished from removal by impeachment) may be made in a number of states by joint action of the governor and senate or by joint action of the legislative bodies. State legislatures have fallen willing victims to a temptation to which Congress has often yielded, the temptation to regulate the details of administration. For example, legislatures not only decide what departments shall be organized, but they usually prescribe in great detail the internal organization of the departments—a function which administrative authorities could discharge much better and save the time of the legislatures while so doing. Legislatures not only enact laws for the protection of fish and

³¹ Some interesting reflections on the problems the legislators face in reaching their decisions on matters of policy are found in T. V. Smith's "Two functions of the American Legislator," *Annals*, CVC, 183.

³² In Oregon corrupt and otherwise delinquent officials are supposed to be dealt with by the courts as ordinary criminal offenders. Macdonald, *op. cit.*, p. 166 n.

game, but they may lay down the most detailed and technical regulations as to how fish and game shall be protected; and laws enacted for the purpose of eradicating or controlling the hoof-and-mouth disease may contain the most minute directions as to just how this shall be done. Now, authorities will agree that the legislature should provide for the protection of fish and game and for the eradication of the hoof-and-mouth disease, but they will also agree that the legislature should stop with the statement of the objects to be accomplished and the creation of the agencies for accomplishing them, leaving the details to be worked out by such administrative agencies. Legislatures have neither the time nor the technical information necessary for making administrative regulations.

AN ENCOURAGING DEVELOPMENT. It is indeed encouraging to see that the practice of leaving details to be worked out by administrative authorities is growing. Boards of health are being given the authority to draw up sanitary codes; industrial commissions are being empowered to make rules and regulations for guarding against fire hazards, personal injuries, disease, etc.; and public utility commissions, for some time, have been authorized not only to make ordinary rules and regulations respecting public utilities, but also to fix the rates which may be charged for services. Since about 1930, this desirable movement has proceeded at a rapid rate, leaving the legislatures more time to devote to what should be their chief function, the formulation of policies.³³

Confidence in early legislatures. In colonial times, especially during the period immediately preceding the Revolution, the people thought of their legislatures as strongholds of defense against the attacks made on their liberties by the governors who represented the British crown. When independent state governments were established after 1775, it was but natural that this confidence in the legislatures should continue, and that these bodies should retain all the powers they previously possessed and acquire a number of those which were formerly held by the governors. Practically the only limitations on the powers of the legislatures of a hundred fifty years ago were in the provisions for frequent elections and in the bills of rights.

Legislatures forfeited public confidence. The legislatures did not keep for long, however, the high place they held in public esteem. From the very first, land speculators intrigued with legislators for grants of large tracts of western lands at nominal prices—the land to be developed and advertised and sold at advanced prices, to the enrichment of the land companies and not infrequently to the profit of accommodating legislators. A little later, there was great demand for roads, bridges, canals, and, after 1830, railroads. To secure their construction, legislatures granted to various concerns charters of incorporation, amounting in many cases to

³³ Kansas Legislative Council, "Legislative Functions of Administrative Agencies" (1938).

monopolies, and, along with the charters, most liberal, even prodigal, grants of land. In connection with these charters and grants, the opportunities for corruption were too frequent and tempting to be resisted at all times by all legislators. In like manner, much unwisdom and some corruption were shown in the ease with which legislatures granted bank charters to irresponsible promoters, with the result that the people suffered greatly, particularly in the West, from the operations of "wildcat" banks. Not only were the states too liberal in granting privileges to private corporations; but the states themselves went into banking, and undertook the construction of roads, canals, and railroads on a grand scale. When the first panic struck (1837) a number of the states were heavily in debt and some of them repudiated a part of their obligations. Let us not suppose that the constituents had been prophesying that dire results would follow the prodigality of their representatives. Rather was it in response to the voice of the people that these programs were undertaken. Nevertheless, when the mistakes and blunders stood revealed, the legislatures were not saved by the plea that they had given the public what it wanted.³⁴ Consequently, a large part of the history of state legislatures, especially since the middle of the nineteenth century, is written in the limitations placed upon them.

Present limitations. Legislatures are now commonly limited in respect to organization and procedure by constitutional stipulations on such matters as the number of members, length of sessions, rate of pay, the manner in which bills, especially money bills, may be introduced, the steps in the passage of a bill, and the method of voting. More important than these restrictions are the constitutional limitations on the scope of legislative action.

1. **MATTERS OF FINANCE.** The financial mistakes and excesses noted above led in many states to severe restrictions on taxation, appropriations, and debts. It is generally stipulated that taxes shall be uniform and equal on all types of property, although this provision is now frequently modified by such exceptions as the authorization of an income tax and the permission to classify property for purposes of taxation. Constitutions sometimes limit the rate of taxation, both state and local; and, in order that the rates shall be kept down and vicious favor seeking shall be avoided, frequently deny legislatures the right to exempt from taxation, persons, corporations, or localities. However, exemption is ordinarily authorized for private schools, religious, and eleemosynary institutions.

In making appropriations, legislatures must restrict themselves to those which are for a public purpose. Donations to individuals or private corporations are commonly forbidden. The form of appropriation bills is usually specified by some such provision as: "The general appropriation bill shall embrace nothing but appropriations for the different depart-

³⁴ See the discussions of abuse of legislative power in Bates and Field, *op. cit.*, pp. 174 ff.

ments of the state, for state institutions, for public schools, and for interest on the public debt. All other appropriations shall be made by separate bill, each embracing but one subject."³⁵

The authority of both legislatures and local governing bodies to borrow money is commonly restricted to specified amounts or to a small percentage of the assessed valuation of taxable property; but it is usually provided that these amounts may be exceeded with the approval of the majority of the voters in the area for which the indebtedness is proposed, an approval which in practice has been very easy to obtain. In like manner, the constitutions usually prohibit the states and their various subdivisions from making loans to individuals, associations, or corporations.

2. SPECIAL LAWS. The majority of the states, in order to save the time of legislatures and to prevent abuses, now have constitutional prohibitions against the enactment of such local and special laws as those preventing the throwing of sawdust in Big Ivey Creek in Buncombe County and the shooting of firecrackers within one mile of the post office at Haw River,³⁶ reinstating a discharged fireman in Boston, granting a special privilege or franchise to a corporation, and voting a special charter to a city. A common prohibition is that no special law shall be enacted when a law of general application can be made to serve. This prohibition is ineffective in many states because the legislature itself passes upon the question of the necessity of a special law. But in the few states in which the courts determine the matter, the restriction is effective.

More important than this general prohibition against special legislation, is the specific enumeration of subjects on which the legislature shall pass no special law. This list may run as high as thirty or more, and it includes such subjects as the granting of divorces, the chartering of corporations (both private and municipal), changing the rules of evidence, changing the names of individuals, the punishment of crimes and misdemeanors, locating or changing county seats, and laws affecting the estates of deceased persons or of minors. The question as to whether an act violates any of these prohibitions is determined by the courts, not by the legislature. Another method of limiting the activities of legislatures in passing special bills is found in procedural requirements. For example, in New York a two-thirds vote of the entire membership is required to pass a special or private bill appropriating money, and in several states, including New York, acts which apply to particular localities must be referred to such areas for their approval.

It should be noted that prohibitions against special legislation do not prevent the legislatures from making reasonable classifications. For instance, a prohibition against granting special charters to cities does

³⁵ Const. of Arizona, Art. IV, sec. 20.

³⁶ See Mathews, *op. cit.*, p. 247, note, for a list of such local laws enacted by a North Carolina legislature.

not prevent legislatures from classifying cities according to population and giving the different classes different charters. In like manner, the Fourteenth Amendment of the Federal Constitution, which prohibits the states from denying to any person the equal protection of the laws, does not mean that the legislatures may not make reasonable classifications of persons and corporations for purposes of taxation and regulation. Thus, doctors may be subject to one set of regulations, lawyers to another, and mechanics to none at all. Railroads may be taxed by one method, and ordinary property owners by another.³⁷

3. INDIRECT LIMITATIONS. Bates and Field ³⁸ call attention to the fact that legislatures are limited, not only by constitutional provisions which apply directly to them, but also by provisions and extraconstitutional developments which transfer power from legislatures to other organs of government. We have already learned that the veto enables the governor to wield a tremendous power over the legislature in practically every state. The growth of his authority over the budget and appointments indicates some decrease in legislative power over these subjects. With the general approval of the public, the governor frequently assumes the reins of legislative leadership in formulating and securing the adoption of policies, thus decreasing the importance of the legislature in a field peculiarly its own.

In the early days, the courts took a broad and liberal view of legislative powers. Thus, in North Carolina, in 1794, the supreme court held that the people did not adopt a bill of rights "against a power they supposed their representatives might usurp, but against oppression and usurpation in general."³⁹ Contrast this with the declaration of the Texas court, in 1918, to the effect that, since the constitution of that state directed the legislature to pass a local option law, it prevented the legislature from controlling the liquor traffic in any other way. Other cases of this kind could be cited to show that, despite the theory that a legislature has all powers not denied it by the Constitution of the United States, and the constitution of the state, the courts are now inclined to hold that authorization or direction to take certain action serves as a prohibition against taking other, although similar, action.⁴⁰ Indeed, the marked tendency of the courts to apply the doctrine of "implied limitations" to legislative powers has led some authorities to say that it should be checked by constitutional means, and the Constitution of Oklahoma follows this suggestion in a provision which reads: "Specific grant of authority in this constitution upon any subject whatsoever shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."

³⁷ *Ibid.*, pp. 179-181.

³⁸ *Op. cit.*, pp. 178 ff.

³⁹ Quoted, *ibid.*, p. 182, from 1 Hay, N.C. 29.

⁴⁰ Mathews, *op. cit.*, pp. 243 ff.

IV. THE INITIATIVE AND REFERENDUM ⁴¹

In a number of states a lack of confidence in the legislatures is expressed in the initiative and referendum. Through the initiative, the voters may themselves enact a measure which their representatives will not pass; through the referendum, they may defeat a measure which their representatives have passed. The initiative is positive in character; the referendum is negative. The former has been described as "a spur on the flanks," the latter as "a bit in the mouth," of the legislative steed.⁴² Manifestly, those who fear these institutions of democracy because of their alleged radical character should concentrate their efforts against the initiative, since all the referendum can do is to hold the legislature in check. It was never intended by the most earnest advocates of the initiative and referendum that they should supplant representative (republican) government. This was simply the time-honored "scarecry" assertion of those who would frighten the electorate into voting against their adoption. The "I. and R." were intended for emergency or special use, the presumption being that the legislature would ordinarily enact the laws which the majority of the people wanted and refuse to enact those which were advocated by a minority.

Extent of their use. Although the referendum had been in pretty general use during the nineteenth century as a means of having the people pass upon proposed state constitutions and amendments thereto, and in the local communities of some states as a means of giving them their "local option" on the saloon question, neither the referendum nor the initiative was used for ordinary statutes in this country until 1898, when South Dakota introduced both.⁴³ Other states followed in rather rapid succession until about 1912, when the movement lagged, although there is still some interest in it. About twenty states ⁴⁴ now have constitutional provisions authorizing direct legislation, and it is a rare election year (even year) in

⁴¹ R. C. Brooks, *Political Parties and Electoral Problems* (1933 ed.), Ch. XVII; Colorado Legislative Reference Office, *The Initiative and Referendum in Colorado* (1940); Dodd, *op. cit.*, Ch. XX; H. F. Gosnell and Margaret J. Schmidt, "Popular Law Making in the United States, 1924-1936," in New York State Constitutional Convention Committee's, *Problems Relating to Legislative Organization and Powers* (1938); Holcombe, *op. cit.*, Ch. XVI; V. O. Key and W. W. Crouch, *The Initiative and Referendum in California* (1939); James K. Pollock, *The Initiative and Referendum in Michigan* (Bureau of Government, University of Michigan, 1940); Waldo Schumacher, "Thirty Years of the People's Rule in Oregon," *Pol. Sci. Quar.*, XLVII, 242 (June, 1932).

⁴² Brooks, *op. cit.*, p. 498.

⁴³ Switzerland authorized the use of the referendum and initiative for statutes some years before this.

⁴⁴ South Dakota (1898); Utah (1900); Oregon (1902); Nevada (R. 1904, I. & R., 1912); Montana (1906); Oklahoma (1907); Maine (1908); Missouri (1908); Michigan (1908); Arkansas (1910); Colorado (1910); California (1911); New Mexico (1911, referendum only); Arizona (1911); Idaho (1912, but not put into operation until 1933); Nebraska (1912); Ohio (1912); Washington (1912); North Dakota (1914); Maryland (1915, referendum only); Massachusetts (1918).

which the total number of amendments and statutes voted upon by the people of these states does not exceed seventy-five. The number of submissions varies considerably in the states. California, with 47 in 1914, seems to hold the record; but Oregon, Colorado, and some other states have made relatively high scores. A number of cities have the "I. and R." for their local charters and ordinances, particularly the cities which have adopted the newer commission and manager forms of government; and as a rule the urban voters are not slow to avail themselves of their privileges. The student knows, of course, that there is no provision for the use of these direct legislative methods in our national system, and we may add that there is little or no movement for their adoption.

Referendum procedure. Both the initiative and referendum differ in the details of their operation in the several states; but the general principles are the same, and we shall describe them without greatly concerning ourselves with the variations.

1. **COMPULSORY.** First, we shall outline referendum procedure. Every state except Delaware has the compulsory referendum on constitutional amendments, and many states require that form of referendum on banking laws and on incurring a debt beyond a certain minimum. That is to say, constitutional amendments and statutes on the subjects mentioned, having passed the legislature, *must* be referred to the voters and be approved by them before they become effective. In like manner, many cities have the compulsory referendum on charter amendments, incurring indebtedness, and other matters. The compulsory referendum, as we observed above, is not new. In fact, we have long accepted it as a matter of course, and hardly think of it as a referendum at all.

2. **OPTIONAL.** What we commonly have in mind when we speak of the referendum is the optional referendum, which did not come into general use until after 1900. It operates as follows. The legislature passes a statute to which some of the voters object. During the period, usually ninety days, before the statute becomes effective, the opposition circulates a petition for a referendum. If the requisite number of voters, varying in the twenty states from five to ten per cent, sign the petition, the statute must then be held in abeyance until submitted to the whole body of voters for their decision. The submission is usually made on the regular election dates. Manifestly, some measures are designed to meet crises and are needed immediately, and a referendum on them, with the delays it entails, would be intolerable. Consequently, it is customary to give the legislatures the power to designate such bills as "emergency measures" and thus exempt them from the operation of the referendum. Legislatures sometimes abuse this privilege by designating as emergency measures, bills which are not such measures in fact. In order to correct this abuse, some states require an extraordinary majority of the legislature to attach the "emergency clause"; others allow the governor to veto the clause; still

others enumerate the subjects which may not be legislated upon under the emergency classification. No system, however, will eliminate all of the abuse either on the part of legislatures or of voters who originate petitions.

Initiative procedure: 1. **DIRECT.** If certain voters desire a constitutional amendment which the legislature will not propose or a measure which that body will not enact, they draft it, or have it drafted, and then circulate a petition on its behalf. In the nineteen states which authorize the enactment of statutes by the initiative, the number of signers required is usually a little higher than for the referendum; and in the thirteen states in which the constitution may be amended by the initiative, eight require more petitioners for proposing amendments than for proposing statutes. A petition in favor of a measure, signed by the requisite number of voters, places the measure on the ballot at the next regular election, when the entire electorate determines its fate as in the case of a referred measure. This is called the direct initiative because the proposal goes directly to the voters.

2. **INDIRECT.** In several states, the indirect initiative is employed. The proposed measure is first submitted to the legislature; if passed by that body, the matter is settled and the necessity of a popular vote on the question avoided. If not passed, some states require that the proposal be submitted to the people without further formalities; but in other states, additional signatures or other requirements must be met before such submission is made.

The initiative and referendum in operation. There is no dearth of books and articles on the results achieved by the initiative and referendum, and a number of them are authoritative.⁴⁵ From these authorities we may reach several fairly safe conclusions.

1. **EFFECT UPON THE LEGISLATURE.** The system of direct legislation has not encroached upon the regular legislative bodies to any considerable degree. Even in those states which resort most frequently to direct legislation, the legislatures continue to enact practically all of the laws. Nor does it appear that the initiative and referendum have brought about any important change in the personnel of legislatures. The caliber of our lawmakers is pretty much the same as it was a generation ago. As to whether or not the "bit in the mouth" and the "spur in the flank" have improved the output of the duly elected legislative bodies, it is difficult to determine. Perhaps it can be said that the existence of the "I. and R." has at times caused legislators to consider their responsibilities more seriously.⁴⁶

⁴⁵ See references in note 41.

⁴⁶ On the basis of a study of my own state (Washington) I am convinced that the referendum has been used effectively and that the possibility of its use operates as a restraining influence upon the legislature.

2. EFFECT UPON THE BALLOT. Direct legislation has unquestionably added to the tasks of the voter. He must now vote on both men and measures. Although certain measures will receive a relatively high vote in many instances, the fact remains that a large number of voters do not officially express their opinions upon the ordinary measures referred to them. A business man, in telling his wife how to discharge her obligations as a citizen in a particular election, explained that she would be given two ballots; that one contained the names of the candidates, and that the other "had some laws or something on it." He advised her to follow his example and not bother about voting on the laws.

3. POSSIBILITIES OF MINORITY GOVERNMENT. The fact that a considerable portion of the electorate is not interested in referred or initiated measures often makes it possible for a minority (although a majority of those voting on a measure) to carry its point. This situation is not so serious as it may appear to be; for government policies are often determined by minorities. Those who are in any degree familiar with our history know that the Federal Constitution was adopted by convention delegates chosen by a minority of the adult males of the country. A policy determined by an intelligent minority is certainly not greatly to be feared. It is true, however, that minorities of the "lunatic fringe" variety may plague the electorate by submitting to it foolish and absurd measures, and that the indifference of the rank and file of the voters may occasionally result in the passage of a measure of this type. Some states have guarded against this by providing that no measure shall become a law unless a certain percentage of all those voting in the election (as distinguished from those voting on the particular measure) shall have voted on the measures.

4. TYPES OF LAWS SUBMITTED. Measures laid before the people cover a wide range; but the greater number of them have to do with minor changes in the organization of government, state and local. A fair number of them relate to finance—the authorization of an indebtedness, changing the system of taxation, and the like. Public utility measures have not been so numerous; but they have usually caused the most lively interest on the part of the electorate, and, more particularly, the business group concerned. Some important measures have related to schools, roads, alcoholic beverages, and social security. This by no means exhausts the list, but it includes practically all the subjects on which important measures have been referred to the electorate. It is of interest to note that the initiative has not deluged us with radical proposals: that conservatives have learned to use it quite as effectively as "radicals"; and that the groups which use it, be they the respectable or the disinherited, are those groups which are not well represented in the legislature.

5. THE QUESTION OF THEIR EDUCATIONAL VALUE. It is often said that the initiative and referendum educate the electorate; that they stimulate interest in government in general. This can hardly be questioned, but the

extent to which they stimulate the voters to intelligent action is by no means certain. In a few states "publicity pamphlets" are mailed to each voter or household, but the evidence we have does not indicate that the voters read them or any part of them with particular care. This does not mean, however, that the citizens do not receive some civic enlightenment from the discussions of the measures; but only that they may rely chiefly upon the spoken rather than the written word. Written appeals may move the educated classes, but the rank and file prefer the oral medium. There is no doubt that direct legislation creates a greater interest on the part of the electorate in state policies, and it cannot be said that the interest does not run high when major questions are up for decision. Without having made any exhaustive study of the question, but having resided in states which have and in those which do not have direct systems of legislation, the writer is of the opinion that the voters in the former states are much more concerned about public affairs than the voters in the latter.

Initiative and referendum likely to be retained. A generation ago the lines on direct legislation were drawn, broadly speaking, between the liberals, who favored it, and the conservatives, who opposed it. Since neither the hopes of the former nor the fears of the latter have been realized, the lines have tended to break somewhat; but its defenders are still found chiefly among the ranks of the liberals. Students examine the record of the I. and R., admit their shortcomings, point out their desirable features, and give them cautious endorsement. It is altogether probable that they will be retained by the states which now have them, although other states will proceed with considerable circumspection in adopting them. It is also likely that changes will be made in their operation: through authorizing a greater use of the indirect initiative and the submission by the legislature of a substitute measure for the one originally proposed; through lengthening the list of subjects on which the people may not legislate directly; through providing more official help for the drafting and scrutinizing of initiated measures; and through other provisions of a similar character.

The 1941 edition of the *Model State Constitution* has some suggestions relative to the initiative and referendum which public men and students of government might well consider. One such suggestion, as explained in the chapter on the governor, is that the chief executive be authorized to call a referendum on any bill which fails to pass the legislature, and that the legislature be authorized, by majority vote, to submit to the people any measure vetoed by the governor, if, upon reconsideration by the legislature, it is not approved by a two-thirds vote but is approved by at least a majority vote. Another suggestion is that so-called "emergency measures" be made subject to the referendum, but that such measures be operative during the period between the filing of the referendum petition

and the date of the election. This provision would eliminate some of the abuse to which legislatures have put the "emergency clause." A suggestion of particular significance is that "The initiative shall not be used as a means of making appropriations of public funds, nor for the enactment of local and/or special legislation. No measure submitted by the initiative shall contain therein the name of any person to be designated as administrator of any department, agency or service to be established by the proposed law or constitutional amendment." The committee of experts probably had in mind the several pension proposals submitted in recent years to electors in various states, and the section by which such proposals would be rendered invalid might be characterized as the "anti-ham-and-egg" proviso.

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The Federal Judicial System

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Having concluded our study of the executive and legislative branches of the national and state governments, we are now ready to examine the judicial branch. We shall deal first with the federal (or national) judicial system. The framers of our Constitution considered leaving to the state courts the task of applying the federal laws; but, since one of the fatal weaknesses of the government of the Confederation was the absence of a national judiciary, the idea of correcting this defect in the new government was uppermost in the minds of the delegates who desired to establish a government worthy of the name. They therefore authorized Congress to establish an independent judiciary.

I. ORGANIZATION OF THE FEDERAL COURTS ¹

Constitutional provisions on organization. The Constitution (Article III, section 1) provides only that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme Court and the inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office." Another important provision (Article II, section 2, clause 2) is that judges of the Supreme Court shall be appointed by the President with the advice and consent of the Senate. Since it is commonly agreed that judges of the inferior courts are not inferior officers, it is understood that they must be appointed in like manner.

Federal judicial system organized by Congress. It is thus quite clear that, except for the constitutional limitations relating to appointment and tenure, and the guaranty against a reduction in the salary of judges, the organization of the courts is entirely within the power of Congress. The constitutional provision relating to the establishment of the courts, except the Supreme Court, is permissive, not mandatory. But not even the Supreme Court was established by the Constitution. The judiciary article simply requires Congress to establish it.

¹ J. M. Mathews, *The American Constitutional System* (1940 ed.), Ch. XIII; W. W. Willoughby, *Principles of the Constitutional Law of the United States* (1930 ed.), Ch. L.

THE SUPREME COURT. Congress established the Supreme Court with a Chief Justice and five associate justices in 1789. By later acts the number of judges was sometimes increased and sometimes decreased, but in 1869 the number was fixed at nine, where it has remained ever since.

THE CIRCUIT COURTS OF APPEALS. At the same time, Congress established two classes of inferior courts, the district and the circuit courts. The district courts have been left substantially unchanged to this day; but the circuit courts were abolished in 1911, their original jurisdiction being transferred to the district courts, their appellate jurisdiction having been transferred to the newly created circuit courts of appeals. There are ten of these last-mentioned courts, one for each judicial circuit into which the United States is divided. There is also a circuit court of appeals for the District of Columbia. A circuit court of appeals has from three to seven judges.

Formerly, judges of the Supreme Court participated in the work of the circuit courts. Such assignments are still made, one associate justice being now assigned to two circuits to take care of the tenth circuit; but the pressure of judicial business in Washington has long since reduced the circuit work of Supreme Court judges to a pure formality.

THE DISTRICT COURTS. The lowest of the federal courts are the district courts, of which there are more than ninety. Often a state forms a single judicial district, but the larger and more populous states are divided into several districts. Some districts have two or more district judges, and, for convenience, some districts are divided into several divisions. District courts have been established for Alaska, Hawaii, the Virgin Islands, the Canal Zone, and Porto Rico. There is, however, no such court in the Philippines. A judge is required to reside in the district for which he was appointed, although from time to time he may be assigned to assist in judicial work outside his own district.

The judicial council. Formerly, the district courts and circuit courts of appeals were practically independent units. That is, the judges dispatched the business of the courts in the respective districts and circuits as best they could, with little aid or advice from the outside. In some districts the work was relatively light and easily disposed of, while in others the great number of cases caused congestion and delay. A remedy was provided by an act of Congress in 1922. By this act, the Chief Justice is required to call an annual conference of the ten senior circuit judges, who shall advise with him "as to any matters in respect to which the administration of justice in the courts of the United States may be improved." The senior district judge of each district court is required to make a report to this conference through the senior circuit judge of the circuit in which his district is located. This report must set forth the condition of judicial business in the district, including the number and character of cases on the docket, the business in arrears, and similar in-

formation. On the basis of facts before it, the conference then prepares plans "for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need thereof, and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business."² The federal courts are thus unified to the extent of the powers of this conference to bring about such unification. The plan for the transfer of judges is of particular merit, since the tens of thousands of cases commenced each year in the federal courts do not obligingly distribute themselves among the districts in accordance with the capacity of the several courts to dispose of them.³

Administrative Office of the United States Courts. By an act approved August 7, 1939, Congress created the Administrative Office of the United States Courts. The Director of the Office has no administrative duties relating to the Supreme Court, but he has charge, under the supervision and direction of the conference of senior circuit judges, of various administrative matters touching the operation of the other courts. His duties include: administrative supervision of the offices of clerks and other administrative personnel of the courts, but not to appoint them nor to interfere with the authority of the Attorney General over district attorneys and marshals; examining the dockets of the courts and securing information as to their needs for assistance, and the preparation of statistical data and reports of the business transacted by the courts; the purchase, transfer, and distribution of equipment and supplies; the auditing of accounts; the providing of accommodations for the use of the courts; the preparation and submission of the budget of the courts, except the budget of the Supreme Court; and such other duties as may be assigned by the Supreme Court and the conference of the senior circuit judges. This Office is obviously not only useful for general administrative work in the judicial system, but it also serves the judicial conference in helpful capacities.

II. JURISDICTION OF THE FEDERAL COURTS ⁴

Constitutional provisions. Article III of the Constitution stipulates that "the judicial power shall extend (1) to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; (2) to all cases affecting ambassadors, other public ministers, and consuls; (3) to all cases of admiralty and maritime jurisdiction; (4) to controversies to which the

² Title 28 U.S. Code sec. 218.

³ N. J. Padelford, "The Federal Judicial Conference," *Am. Pol. Sci. Rev.*, XXVI, 482 (1932). See also *Annual Report of the Attorney General of the United States* (1941), pp. 19-42.

⁴ C. N. Callender, *The American Courts* (1927), Ch. III; Mathews, *op. cit.*, Ch. XIV; Willoughby, *op. cit.*, Chs. LXI-LXII.

United States shall be a party; (5) to controversies between two or more states; (6) between a state and citizens of another state; (7) between citizens of different states; (8) between citizens of the same state claiming lands under grants of different states; and (9) between a state, or the citizens thereof, and foreign states, citizens, or subjects." By the Eleventh Amendment (adopted, 1798), the federal courts were deprived of their jurisdiction in cases brought against a state by citizens of another state or by citizens of a foreign state.

Jurisdiction determined by: 1. **THE CHARACTER OF THE CASE.** From the quotation above it will be seen that the federal courts acquire jurisdiction through the character of the *case* or the *parties*. Chief Justice Marshall pointed this out in *Cohen v. Virginia* (1821). All cases, regardless of who the parties may be, arising under the Constitution, federal laws (with a few exceptions in which Congress has given the state courts jurisdiction), and treaties, fall under the jurisdiction of the federal courts. In like manner, all admiralty and maritime cases come under the jurisdiction of the federal courts. This may be clarified by examples. A state legislature or city council passes a measure which deprives some individual of his property without due process of law. Since this is prohibited by the Fourteenth Amendment, it is a matter over which the federal courts have jurisdiction. It is a case arising under the Constitution of the United States. Suppose an individual has some claim to a patent under the federal patent law, and one interpretation of that law will defeat his claim while another will sustain it. He has a case arising under the laws of the United States. Similarly, a trading privilege or some other right asserted under a treaty which involves the construction of that treaty, is a proper case for the federal courts. A ship is taken as a prize in war time by one of our vessels, a crime is committed aboard an American steamer on the high seas, a seaman is unable to collect his just wages—these are cases which, because of their character, go to the federal courts. To repeat, whatever the character of the parties, cases arising under the Constitution, laws (with a few exceptions), and treaties of the United States, and admiralty and maritime cases, are cases over which the federal courts have jurisdiction.

2. **THE CHARACTER OF THE PARTIES.** Other cases go to the federal courts because of the character of the parties. Important cases of this type are: (1) those affecting ambassadors, other public ministers, and consuls (not American representatives abroad, but only foreign representatives in the United States); (2) controversies to which the United States is a party; (3) controversies between two or more states; (4) cases instituted by a state against citizens of another state (but not cases instituted against a state by a citizen of another state or by a citizen of a foreign state); and (5) cases between citizens of different states. To make this type of jurisdiction clear, we note that an ambassador carries his case to the federal courts, not

because of the character of the case, but by reason of his status as an ambassador. Two citizens of the same state may have practically the same case, involving, let us say, an important contract, as citizens of different states; but only the latter may carry their case before the federal courts, since they alone have the status (residence in different states in this instance) which entitles them to use these courts.

Exclusive and concurrent jurisdiction. There is no doubt that Congress has the authority to vest federal judicial power exclusively in tribunals created by itself. In certain types of cases this is necessary, and in other cases it seems advisable. Suits affecting ambassadors, other public ministers, and consuls, since these officers are accredited to the United States, naturally fall under the exclusive jurisdiction of the federal courts. Since the national government has the exclusive power to make war, prize cases are within the exclusive jurisdiction of its courts. Again, the federal courts are given exclusive jurisdiction in all cases in which the United States is a party, in controversies between the states, and in suits brought by a state against citizens of another state. This does not complete the list. In a number of very common cases, to be noted when we consider the jurisdiction of the federal district courts, Congress permits the state courts to exercise a concurrent jurisdiction with the federal courts.

Adjunct powers of the courts. The federal courts possess the powers necessary to maintain dignity and order in their proceedings, even without statutory authorization. Thus, they may punish persons for contempt, although Congress has limited this power in some respects. Congress has expressly authorized the courts to issue writs of *habeas corpus* and to issue other writs "not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."⁵

The great writs. The writs of (1) *habeas corpus*, (2) *mandamus*, and (3) *injunction* are the most important.

1. The writ of *habeas corpus*, a common law writ, may not be issued just because some one is in jail and wants to get out. It is issued by federal courts only when an individual is detained in connection with some matter over which such courts have jurisdiction. Thus, a person held on the suspicion that he has robbed a local filling station operator must apply to a state court for the writ; while either a person held for a violation of the federal narcotics act, or a federal marshal charged with murder while defending the person of a federal judge, may apply to a federal court for the writ. The procedure in connection with this writ has been sufficiently explained elsewhere.⁶

2. *Mandamus* is another common law writ. It is used to compel some private person, corporation, public official, or lower court to perform a

⁵ 28 U.S. Code 377.

⁶ See Ch. 5, sec. III.

particular duty imposed by law. A common carrier which fails to comply with certain sections of the transportation acts may be mandamusd by a district court upon the application of the Attorney General at the request of the Interstate Commerce Commission. The most interesting cases in which the writ is used are those in which it applies to the acts of executive officers. The President is not subject to mandamus, nor may other executive officials be mandamusd in connection with matters over which they are given discretion; but where the subordinate officials have a service to perform in which they are given no discretion (a mere ministerial service) the mandamus will be issued at the request of parties having a proper claim. For example, a citizen cannot mandamus the Secretary of the Treasury for refusing to consider him for an appointive position in his department; but if the citizen is legally entitled to funds from the United States, he could mandamus the disbursing officer should he withhold them.

3. The writ (or bill) of *injunction* is an equity remedy. Federal courts may enjoin parties from instituting proceedings in state courts, in order to preserve their own jurisdictional rights. In like manner, the federal tribunals may enjoin state officers from enforcing state laws which are in contravention to the national Constitution; a railroad company from laying its tracks until a franchise right has been determined; and striking workmen (until quite recently) from interfering with the business of their employers. Formerly the frequent use of the injunction in connection with labor troubles caused much political controversy and some bitterness on the part of labor leaders. The party who violates an injunction is guilty of contempt of court, and he may be brought in and summarily sent to jail without trial by jury.⁷

Jurisdiction of the several classes of federal courts. Up to this point we have been considering the question of the jurisdiction and powers of the federal courts in general. Now we shall see just what kind of jurisdiction each class of the federal courts—district courts, circuit courts of appeals, and the Supreme Court—possesses.

1. **DISTRICT COURTS.** The district courts have appellate jurisdiction only with respect to judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws. Their jurisdiction is original in all other cases which may be brought to them. Chapter 2 of the *Judicial Code* details the original jurisdiction of these courts. Here we shall simply make a partial enumeration, as follows: crimes and offenses against the United States; admiralty and maritime cases; prize cases (cases of capture on the high seas in time of war); cases arising under the internal revenue and tariff laws, excepting certain tariff cases in which the Court of Customs and Patent Appeals has jurisdiction; suits under the postal, interstate commerce, patent, copyright, and trade-mark laws; suits respecting civil rights; suits and proceedings in bankruptcy; and concur-

⁷ On the writs, see Beard, *The American Leviathan* (1930), pp. 121-123.

rent jurisdiction with the Court of Claims in suits against the United States where the claim is not in excess of \$10,000. Furthermore, the district courts have original jurisdiction "of all suits of a civil nature, at common law or equity, brought by the United States, or by any officer thereof authorized by law to sue." In cases arising under the Constitution, laws, and treaties of the United States, cases between citizens of different states, and between citizens of a state and foreign states, citizens, or subjects, where the matter in controversy exceeds \$3,000, they have concurrent jurisdiction with the state courts. But where an action is originally brought in a state court, the defendant may, under certain circumstances, have the case removed to a federal district court. If the amount in controversy does not exceed \$3,000, the state courts have exclusive jurisdiction. It is thus clear that as far as the federal district courts have jurisdiction, it is original in all except Chinese exclusion cases; but they fall far short of having original and exclusive jurisdiction in all cases, the state courts being given concurrent jurisdiction in many cases and exclusive jurisdiction in others.

2. **CIRCUIT COURTS OF APPEALS.** The circuit courts of appeals have no original jurisdiction. Their chief business is to hear numerous appeals from the district courts, although certain classes of appeals go direct from the district courts to the Supreme Court. In addition, the circuit courts have appellate jurisdiction in cases coming from the district courts in the territories; and they are empowered to enforce, set aside, or modify certain orders of the Federal Trade Commission, the Interstate Commerce Commission, and the Federal Reserve Board. The decisions of these courts are final in all cases between citizens of different states, in cases arising under the criminal, patent, copyright, bankruptcy, or revenue laws, and in a few other cases. Thus the primary purpose for which these courts were created, namely, to free the Supreme Court of a large number of appeals, has been accomplished. We should add, however, that the Supreme Court may have any of the cases mentioned above brought before it for final determination, if a party so petitions and if the Supreme Court deems it advisable.

3. **THE SUPREME COURT.** The Supreme Court has original jurisdiction only in two types of cases: (1) those affecting ambassadors, other public ministers, and consuls; and (2) cases in which states are parties. Congress has no authority to give the Supreme Court original jurisdiction in cases other than those enumerated. On the other hand, Congress has not hesitated to grant to inferior federal courts concurrent jurisdiction in some of these cases; for instance, cases between a state and citizens of another state. Congress has not, and may not, deprive the Supreme Court of its original jurisdiction. It has simply given other courts a concurrent original jurisdiction. By far the largest part of the work of the Supreme Court is appellate and regulated by acts of Congress. A few cases may

be appealed from district courts to the Supreme Court, but nearly all of the appeals come from circuit courts. As indicated above, many cases are decided finally by the circuit courts of appeals and may not be carried to the Supreme Court except by its order. But in important cases, such as those involving the construction of the Constitution of the United States, the constitutionality of acts of Congress, and treaties, and cases in which state constitutions or laws are claimed to be in contravention to the Constitution of the United States, the Supreme Court has regular appellate jurisdiction. Of particular importance in our system of government is the appellate jurisdiction of the Supreme Court in certain types of cases which have been decided in the highest state courts. It must be emphasized that not every case decided in a state supreme court may be so appealed. When no federal question is involved in a case, it is decided with finality by the supreme court of the state. But where a case arises under the Constitution, laws, or treaties of the United States, or in connection with some right or duty under the government of the United States, it may be appealed to the Supreme Court.⁸

III. THE LAW ADMINISTERED BY THE FEDERAL COURTS

✓ 1. **Federal.** It is understood, of course, that the Constitution itself is a law which the federal courts must apply, and that they must set aside any other "law" which contravenes its provisions. Treaties and acts of Congress passed in pursuance of the Constitution are laws. Thousands of cases come before the federal courts every year under provisions of acts of Congress. Thus, the federal bankruptcy statute is applied in the 60,000 or more bankruptcy cases which arise annually. Numerous cases arise under the commerce and postal acts, to mention only two other types of cases.

Although, as will be shown presently, there are numerous civil suits which arise under common law and equity rather than under federal statutes, this is not true of the criminal cases. Equity applies only in civil cases, and there are no federal common law crimes. The only federal crimes are those specified in acts of Congress. There are quite a few such crimes, however, for Congress is authorized (1) to provide for the punishment of counterfeiting; (2) to define and punish piracies and felonies committed on the high seas, and offenses committed against international law; (3) to declare the punishment of treason; (4) to exercise *exclusive* legislation for the District of Columbia and places purchased for the erection of forts and arsenals; (5) to make *all* needful rules and regulations respect-

⁸ Strictly speaking, appeal lies only in those cases in which the state courts decide against a right claimed under federal law. Cases in which state courts uphold a right claimed under federal law are reviewed by the Supreme Court of the United States only at its discretion. Litigants have no right of appeal in such cases.

ing the territories; and (6) above all, through its implied powers, to provide penalties for the violation of any law which it enacts. Illustrating the last-mentioned authority, the power to regulate interstate commerce and to establish post offices and post roads gives Congress the power to prescribe punishment for violation of laws with respect thereto. Before Prohibition repeal there were many criminal prosecutions under the dry laws, 56,992 of the 87,305 prosecutions in 1930 falling in the class of Prohibition cases.

2. International law. The federal courts frequently apply international law. While the courts are bound by an act of Congress which may be contrary to international law, it was early held that such "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"⁹ and that "till an act be passed, the court is bound by the law of nations, which is a part of the law of the land."¹⁰ Prize cases, piracy cases, cases involving the interpretations of treaties, and boundary disputes between American states, are but a few of the cases in which international law is applied.

3. The common law. The federal courts have jurisdiction in a large body of cases to which no federal law is applicable. These are the cases of "diversity of citizenship," cases between citizens of different states. A citizen of Illinois sues a citizen of Indiana, let us say, for damage to property or for personal injury. It was made clear in the last section that the Illinois man may bring suit in a federal district court in Indiana. But there is no federal law covering such matters. What law or laws, then, will the federal court apply? The Federal Judiciary Act of 1789 gives the answer: "The laws of the several states . . . shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." In the case just mentioned, the federal district court in Indiana would apply the laws of that state. For a hundred years or more there was confusion on this point. The courts of the United States applied the state statutes in such cases, but where there were no statutes, and if they happened not to approve of the common law doctrines of a particular state, they formulated a sort of "general law" of their own. This is now clarified, however, by a recent decision of the Supreme Court,¹¹ and the federal courts are following state law, both common and statute, without exception.¹²

4. Equity. It is recalled that the federal judicial power extends to cases in law and equity. In the next chapter both the common law and equity will be explained further, but for present purposes it is perhaps in order to say that equity is that division or branch of the old English and Ameri-

⁹ *The Charming Betsy*, 2 Cranch 64 (1804).

¹⁰ *The Nereide*, 9 Cranch 388 (1815).

¹¹ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), R. E. Cushman, "Constitutional Law in 1937-38," *Am. Pol. Sci. Rev.*, XXXIII, 246 (April, 1939).

¹² W. F. Dodd, *Cases and Materials on Constitutional Law* (1941 ed.), p. 342 n.

can law which sometimes provides better remedies than the common law and protects certain rights not covered by that law. The courts of the United States have not been required by Congress to follow as "rules of decision" the equity rules of the several states. The requirement is only that the equity rules administered in the federal courts shall be the customary ones; and long ago the Supreme Court declared that "the remedies in equity are to be administered, not according to the state practice but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject of course to the provisions of the acts of Congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may from time to time prescribe."¹³

IV. PROCEDURE IN THE FEDERAL DISTRICT COURTS

The district courts are the trial courts, the courts of first instance, in the federal system. It is unnecessary to dwell at length upon procedure in these courts, since it does not differ in a material way from procedure in the typical state courts. Uniformity in procedure in federal cases has been brought about by acts of Congress and, more recently, by the Supreme Court which, acting under authority granted by Congress, has prescribed rules of procedure for the lower courts. Rules so prescribed now govern procedure in civil cases in the district courts, bankruptcy proceedings, admiralty cases, copyright cases, and appellate proceedings in criminal cases. It was not until 1940 that Congress authorized the Supreme Court to prepare and promulgate rules of procedure for the trial of criminal cases in the district courts. An advisory committee is now preparing a draft of such rules for the consideration of the Court.¹⁴

Criminal cases. Crimes of burglary, robbery, kidnapping, rape, and "singular murders in love triangles"—the types of crime that grab the headlines—are offenses over which state courts commonly have jurisdiction. It has been noted above, however, that there is also a wide variety of federal crimes. If they are less interesting to the morbidly curious than the state crimes, that is an advantage to the federal courts, making it less difficult to maintain dignity and avoid sensationalism in their proceedings.

Space permits only a brief comment on federal procedure in criminal cases. The Constitution provides that no person shall be tried for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. Infamous crimes are declared in the *Penal Code* of the United States to be offenses which are punishable by death or imprisonment for a term exceeding one year. Offenses which carry a penalty of imprisonment for one year or less are deemed to be misdemeanors, and

¹³ Boyle v. Zachaxie, 6 Peters 635 (1832).

¹⁴ *United States Government Manual*, Summer, 1943, pp. 46-47.

there is no indictment by grand jury in such cases. When an infamous crime has been committed, a grand jury, consisting of from sixteen to twenty-three persons, assisted by the district attorney, investigates, and, if possible, returns an indictment naming the crime and the accused. The Constitution requires that the accused be given a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed; that he shall be informed of the nature of the accusation; that he shall be confronted with the witnesses against him; that he shall have compulsory process for obtaining witnesses in his favor; that he shall have the assistance of counsel; that he shall not be compelled to be a witness against himself; that he shall not be deprived of life, liberty, or property without due process of law; and that he shall not be twice put in jeopardy for the same offense.¹⁵

Civil cases. The ordinary suits at common law are those in which parties seek to obtain possession of land from which they have been ousted or to which they have been denied access, suits for damages in cases of breaches of contracts, damage suits for injuries resulting from torts (trespasses, for example), and actions to recover personal property. The court of original jurisdiction, when sitting as a court of law, must, in conformity to the Seventh Amendment of the Constitution, try cases involving amounts in excess of twenty dollars before a jury, unless the jury is waived. Each party, of course, has counsel, and witnesses are examined and cross-examined. When all the evidence has been heard and the arguments have been made, the judge explains the law involved to the jury; but the facts are left for the jury to decide. The jury then deliberates and brings in the verdict, which in the federal courts must be unanimous. The judge may set aside the verdict if the jury has ignored his rulings on points of law, or if the jury's decision is clearly contrary to the evidence, or if the jury has reached its conclusion by some irregular means. However, if the judge sets aside the verdict, that does not mean that the other party wins, but only that a new trial must be held. This taking of cases from the jury is a much more common proceeding in the federal courts than it is in the state courts; and, considering the limitations of the jury system, it perhaps explains in part the higher confidence commonly reposed in the federal courts. As has already been explained, equity affords relief in numerous cases not covered by the common law. Cases in equity are decided by a judge or judges alone, no juries being used. The equity proceeding with which most of us are familiar is that in which an injunction is sought. The great majority of civil cases, whether in law or equity, are cases which arise under state law and over which state courts have exclusive jurisdiction.

¹⁵ See Ch. 5, sec. III, for a fuller discussion of these Constitutional guaranties. See also Chap. 17, sec. VII, which deals in particular with the right to refuse to testify.

V. THE SUPREME COURT ¹⁶

Sessions of the Court. The Supreme Court of the United States is an institution of such transcendent importance in our national life that we must make it a subject of special consideration. Each year it begins its session in October and continues until late in the spring. It is presided over by the Chief Justice, the prestige of whose position is only a little higher than that of an associate justice, and whose duties and powers differ from those of his eight associates only because he is the ceremonial head of the Court and directs certain administrative affairs of the body, as, for example, the naming of an associate to write the opinion of the Court after a case has been heard and discussed. Six of the justices constitute a quorum and a majority of the whole number is necessary for a decision.

Opening of the Court. "Oyez, Oyez, Oyez!" ¹⁷ All persons having business before the honorable judges of the Supreme Court of the United States are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this honorable court." These words are uttered by the clerk in solemn tones entirely free from the perfunctory and commonplace qualities which ordinarily characterize such announcements. The audience in the grand structure where the Court now holds its sessions ¹⁸ is impressed with this regular midday announcement and it rises to its feet as the nine distinguished and elderly men, wearing black silk robes, file in and take their places, the Chief Justice in the center and the associate justices on his right and left in the order of the length of their service in the Supreme Court. The Court is without question the most impressive, even awe-inspiring, body in America. ¹⁹

Presentation of cases. The preliminaries disposed of, the Court settles down to hearing cases. An attorney may talk for as much as an hour, and the judges listen attentively, especially if he is able, clear, and concise. Judges have been known to show some impatience with lawyers who did not have their cases well in hand. On occasion, an earnest young attorney may feel that a judge is not taking the trouble to follow his argument; but he may be agreeably surprised, perhaps embarrassed, by a question from the justice which proves that there was no lack of attention. Eloquent words count for little in this chamber, and perhaps sound a little hollow even to the inept attorney who speaks them. Jury-swaying arguments count for nothing at all. Oral argument is, in any event, only a

¹⁶ C. A. Beard, *The Supreme Court and the Constitution* (1912); F. Frankfurter and J. M. Landis, *Business of the Supreme Court* (1936 ed.); E. Kimball, *The National Government of the United States* (1920), Ch. XVI; C. Warren, *Congress, the Constitution, and the Supreme Court* (1936 ed.).

¹⁷ Old French, meaning "Hear Ye."

¹⁸ Until 1935 it sat in the old Senate Hall in the Capitol.

¹⁹ For some of the material in this and the following paragraph, see the article by Mildred Adams, "In the Supreme Court Law Is Majesty," *New York Times Magazine*, Nov. 10, 1929.

part of the presentation. Printed briefs containing the arguments of counsel and the printed record of the case in the lower court often run into many pages. In one instance, the printed portion of the testimony occupied twelve thousand pages.²⁰

Study and discussion. Ordinarily the Court spends four hours a day, five days a week, in hearing cases. But this no more represents the work of the judges than a few hours in the classroom constitute the work of a conscientious student. The printed records and arguments must be mastered after the case has been publicly presented. References must be consulted, and legal tangles must be straightened out. Then the judges must meet in private for discussion. Occasionally, when a majority cannot reach an agreement, a rearguing of the case is ordered, as instanced by the income tax case in 1895. So exacting and pressing is the work of the justices that they are usually busy both before and after each day's session and frequently have to labor far into the night. Occasionally there are short recesses to give them an opportunity to dispose of accumulated cases.²¹

Decisions. When an agreement in a particular case has been reached, the Chief Justice himself, or an associate designated by him, writes the decision of the Court. It is not necessary that there be unanimity of agreement, or even that the majority agree as to the principles which are applicable; but it is absolutely essential that a majority reach the same conclusion. It may happen, therefore, that: (1) the nine justices may agree both as to the judgment and as to the principles of law on which it is based; (2) a majority may agree as to the judgment and principles, while a minority may dissent; and (3) both the majority and the minority may disagree among themselves as to the principles which govern their respective conclusions. In the event that a justice agrees with the conclusion of the Court but not with the reasons on which it is based, he may write a separate opinion. In like manner, a minority judge may write a dissenting opinion for his group; and if a justice in that minority does not accept the reasons assigned, he may write a dissenting opinion of his own. More will be said of the dissenting opinions presently.²²

²⁰ Kimball. *op. cit.*, p. 401.

²¹ The Court disposes of approximately 1,000 cases each year.

²² All the opinions in each case are, of course, published and distributed. Cases decided before 1882 are cited by the name of the court reporter charged with the duty of having them published. In order, these reporters were: Dallas (4 vols.), Cranch (9 vols.), Wheaton (12 vols.), Peters (16 vols.), Howard (24 vols.), Black (2 vols.), Wallace (23 vols.), and Otto (17 vols.). Thus, *Marbury v. Madison* is cited "1 Cranch 137," the numerals preceding the name indicating the volume and those following the name the page on which the decision begins. Since 1882, all volumes, beginning with 108, are numbered consecutively without mention of reporters' names, and cases decided since that date are cited "*Buck v. Bell*, 274 U.S. 200," "*Finch & Co. v. McKittrick*, 305 U.S. 395," etc. It is also a common practice (and a good one), to give the year of the decision as is done in this text.

JUDGMENT, OPINIONS, AND OBITER DICTA. The judgment of the Court is usually stated in a brief sentence. *Examples*: "It follows that the district court erred in making the order appealed from, and the same is reversed." "There was no error in the judgment of the circuit court of appeals, and it is, therefore, affirmed." "The judgment of the state supreme court is therefore reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion." "Our conclusion is that the petitioner is entitled to be discharged from custody, and it is so ordered." Judgments in such forms constitute the legal decisions of the Court. The discussions, often covering many printed pages, setting forth the principles which control in the case, are designated as the opinions of the Court. Such opinions are accepted as declarations by which the Court will be guided subsequently in similar cases. But in giving its opinions, the Court does not always confine them to the points at issue in the case at hand. It may turn aside to lay down principles on other issues which it desires to see cleared up. Such digressions are known as *obiter dicta*. They are not accepted as stating the position of the Court in subsequent cases to the extent the ordinary opinions are, although they may be applied in proper cases if they happen to conform to the opinion of the Court. Thus, Marshall's *dicta* in *Marbury v. Madison*²³ relative to the distinction between executive and ministerial acts have been followed to this day.²⁴

DISSENTING OPINIONS. Of course, the conclusion of the majority settles a case; but not infrequently a minority opinion is received and discussed with as much interest as the majority opinion. The opinion of Justice Curtis in the *Dred Scott* Case (1857), of Justice Holmes in *Lochner v. New York* (1905), of Chief Justice Hughes in the *MacIntosh* citizenship case (1931), and of Justice Stone in the *A.A.A.* case (1936), are a few of the outstanding dissenting opinions. Those who criticize the opinion of the Court may find much aid and comfort in the dissenting opinion. Thus did the foes of slavery use the minority opinion in the *Dred Scott* Case; the advocates of the rights of the states to use their police power without too much interference from the Supreme Court, the Holmes opinion in the *Lochner* case; the friends of a more liberal naturalization policy, the Hughes dissent in the *MacIntosh* case. When Bryan was criticized for his condemnation of the income tax decision in 1895, he very sensibly replied, "If you want criticism, read the dissenting opinions of the Court." As C. A. and Wm. Beard observe,²⁵ these dissenting opinions are not futile gestures. The minority opinion of the Court today may become the majority opinion tomorrow. In 1936 the New York minimum wage law was held invalid in a five-to-four decision. In 1937 a similar law of the

²³ 1 Cranch 137 (1803).

²⁴ Kimball, *op. cit.*, pp. 402-403.

²⁵ *The American Leviathan*, pp. 116-117.

State of Washington was sustained by the same majority. This is simply one of many examples that might be given.

FIVE-FOUR DECISIONS. Some of the Court's decisions are on the narrow margin of five to four. Such a decision is likely to weaken popular confidence in the Court, for a time at least, especially if it is coincident with a political controversy over the subject to which it relates. Fortunately these so-called "one-man" decisions have not been very common; but the vote was five to four in six of the twelve New Deal cases which were decided before June, 1936. Several constitutional amendments have been proposed which would require a more significant majority in cases in which a legislative act is declared unconstitutional. The wisdom of an amendment of this character is open to serious question. It seems best to leave the Court to work out this problem for itself. Former Associate Justice Clarke suggested that the Court voluntarily adopt a rule similar to the amendments proposed. No Chief Justice is proud of five-four decisions, and we may rest assured that earnest efforts are made to prevent them.

Judicial review. We are now to consider the most distinctive feature of the work of the Supreme Court and the one which has occasioned the greatest controversy, namely, its power to pass upon the constitutionality of legislation. The source of this power and the reasons for its exercise were discussed in Chapter 2, section III. Here we shall simply refresh our memories with the statement that any part of a state constitution or law or any city charter or ordinance which contravenes any provision of the Federal Constitution, laws, or treaties may be nullified by the Supreme Court of the United States, if it comes before the Court in a properly litigated case. Similarly, acts of Congress and treaties may be so nullified.

OPERATES ONLY IN LITIGATED CASES. Many persons seem to think that all acts of state legislatures are submitted to the Supreme Court for its approval, and that all of the statutes of Congress are immediately sent by special messenger to that eminent tribunal, where they are anxiously examined for taints of unconstitutionality. Of course this is absurd. The Court does not pass upon all legislative acts, as the President and governors are authorized to do; nor does it give advisory opinions, although the supreme courts in several of the states may do so.²⁶ The Supreme Court is a judicial tribunal, with the function of deciding only "cases and controversies." A statute of Congress or a state law comes to the Court, therefore, only when a party to a legal controversy tests the validity of the enactment under which it arises. For example, if an individual is held for a crime under an act of Congress, he may test the validity of that act; or, if in a civil suit he claims that a right supposed to be enjoyed by the other party

²⁶ In 1822 the Justices of the Supreme Court individually gave an advisory opinion to President Monroe. See Charles Warren, *The Supreme Court in United States History* (1923), II, 55-57.

to the suit rest on a state law in conflict with the Federal Constitution, he may test the validity of the state law. But persons not parties to a suit, who have only a general interest in its outcome, have no way of testing the constitutionality of a law. With these points in mind, it is easy to understand that the constitutionality of the great majority of legislative measures is never passed upon, although it is true that at some time or other the greater number of the more important acts are so reviewed. It is a matter of considerable interest that such an important statute as the Missouri Compromise of 1820 was never judicially questioned until 1857, when it was declared void.²⁷

OTHER LIMITATIONS ON JUDICIAL REVIEW. In addition to the rule that laws are not declared void except in actual litigation, there are several other limitations upon this power of judicial review. (1) It is held that the unconstitutionality of a statute should be clear "beyond all rational doubt."²⁸ This must be taken to mean "beyond all rational doubt" of the majority of the justices; for to allege that this conviction governed the Court when five of the learned judges held a law void, and four no-less-learned judges held a contrary view, would be humorous to say the least. (2) Only that part of a statute which is unconstitutional is annulled, unless the parts are so interdependent that one may not be stricken out without doing violence to the others. Thus, when the Court held a federal corrupt practices act void as applied to senatorial primaries,²⁹ it was generally understood that other parts of the law still held, and a Republican committee concluded that wisdom and prudence dictated that candidates for the House of Representatives should continue to observe its provisions.³⁰ (3) The Court will not pass upon political questions, that is, questions which, in the opinion of the Court, the Constitution and the general scheme of American government leave to the President or Congress or both. When the State of Georgia questioned the constitutionality of the "Reconstruction Acts," the Supreme Court would take no action, stating that the statutes were political in character and did not involve personal or property rights.³¹ Similarly, the Court will refuse to restrain the President by injunction from carrying into effect an act of Congress alleged to be unconstitutional.³² (4) It is further stated that the Court will not declare void a law which does not violate constitutional provisions but which, in the opinion of the justices, is unwise or oppressive.³³ There are

²⁷ J. M. Beck, *The Constitution of the United States* (1924), p. 226.

²⁸ *Sinking Fund Cases*, 99 U.S. 700 (1878).

²⁹ *Newberry v. United States*, 256 U.S. 232 (1921).

³⁰ J. K. Pollock, Jr., *Party Campaign Funds* (1926), pp. 207-208.

³¹ *Georgia v. Stanton*, 6 Wallace 50 (1868). See also *Coleman v. Miller*, 307 U.S. 433 (1939).

³² *Mississippi v. Johnson*, 4 Wallace 475 (1867).

³³ In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), some of these and certain other limitations are discussed.

many observers, however, who assert that the judges sometimes pronounce laws invalid under the claim that they violate constitutional provisions, when in reality they only violate the judges' economic or social theories.

Number and kinds of laws declared void. How many laws have been declared void? From some of the arguments which have been made against judicial review, one might get the impression that the justices do not feel that they have earned their lunch until they have invalidated some legislative act. In all its history, the Supreme Court has declared void only about eighty acts of Congress, and the greater number of these were of small importance. Five or six times that number of acts have been contested before the Court, but their constitutionality has been upheld. The validity of well over a thousand state laws has been challenged, of which the Court has annulled about one fourth.³⁴ Considering that Congress enacts hundreds of laws annually and that the state legislatures enact thousands, it is obvious, not only that a very small percentage of them are declared void, but also that relatively few laws ever come before the Supreme Court on the issue of constitutionality. It should be added, however, that both the number coming before the Court and the number annulled have increased in recent years.

More significant than the number of laws annulled are the kinds of laws annulled, particularly those which have incited popular criticism. In 1894 Congress passed an income tax law, which was declared void the next year on the ground that certain sections of it imposed a direct tax without apportionment among the states according to population as required by the Constitution.³⁵ Under the provisions of the Agricultural Adjustment Act more than a billion dollars was collected through a processing tax, this money to be paid to farmers who accepted a program of crop reduction. This act, this hope of the farmer, said the Court, was invalid because it provided for expenditures for a regulation lying within the reserved powers of the states.³⁶ We take one other example of the nullification of acts of Congress. A minimum wage law for women and children in the District of Columbia was held to be a violation of the liberty of contract,³⁷ a right deduced from a provision of the Fifth Amendment that no person shall be deprived of life, liberty, or property without due process of law. A number of state laws have been nullified by the Court under the same clause of the Fourteenth Amendment; for example, the statute of the State of New York regulating the hours of employment in bakeries and the same state's minimum wage law for women and children.³⁸

³⁴ H. L. McBain, *The Living Constitution* (1927), pp. 246-251; B. F. Moore, *The Supreme Court and Unconstitutional Legislation* (1913).

³⁵ *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

³⁶ *United States v. Butler*, 297 U.S. 1 (1936).

³⁷ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

³⁸ *Lochner v. New York*, 198 U.S. 45 (1905); *Morehead v. New York*, 298 U.S. 587 (1936).

POPULAR CRITICISM RESULTING. When legislation of the character mentioned above is set aside, the decisions may be received with great protest; for a large part of the public has an interest, either direct or humanitarian, in seeing these laws upheld. The public is not capable of judging the fine points of constitutional construction involved; nor is it in the proper mood to judge, even if it were competent to do so under ordinary circumstances. Nevertheless, when the public feels that the judges have applied their own social philosophy to the cases at hand and that they have done so under the guise of interpreting the Constitution, we should not be too harsh in our judgment of that public, for frequently the minority of the justices take essentially the same view. Thus, in the New York bakery case just referred to, Justice Holmes, in dissenting, declared that the case was decided upon an economic theory which a large part of the country did not entertain, and that the word "liberty" in the Fourteenth Amendment was perverted, when it was interpreted in such a way as to render invalid the New York statute.³⁹ Judges cannot escape their background, their training, their philosophy, much more successfully than the general run of mankind. It would be marvelous indeed if they were not influenced by their own social and economic theories when they come to interpret such broad and indefinite phrases of the Constitution as "due process of law" and the "equal protection of the laws." Clearly, when the Court holds that a ten-hour law for bakeshop employees is not "due process" and that a ten-hour law for women in industry is "due process," it may be plausibly asserted that the magic term is simply being interpreted to fit the judges' ideas of what police laws are needed and what are not needed; that the judges are exercising a power which rightly belongs to the legislators.

The Court and politics. As already indicated, the Supreme Court will not decide political questions. This is true, in a technical sense. For example, it will not decide which of two opposing governments in a foreign country is recognized by the United States, or whether the government of an American state is republican in form, or whether a state of war existed between the United States and some foreign country on a given date. Such questions are characterized by the Supreme Court (and by all other courts) as political, and are left to executive and legislative officers to decide.

But when we take a broader view of what constitutes a political question, we find that some of these questions are decided by the Court. In common parlance, labor laws, income tax laws, social security laws, public utility regulation, agricultural relief, currency legislation, in fact, any

³⁹ In dissenting in *Morehead v. New York*, 298 U.S. 587 (1936), Justice Stone said: "It is difficult to imagine any grounds, other than our own personal economic predilections," for holding invalid a New York minimum wage law.

issues over which various groups of the people divide into more or less hostile camps, are political in character. Such matters, affecting private rights so materially, properly come before the Court, and the decision in each case must please one political group and offend the other. This is unavoidable, and any intelligent citizen can understand why it is so. As long as the judges maintain a calm, objective view, there should be no serious complaints on the part of the public.

On a few occasions, however, the judges have perhaps passed the bounds of judicial proprieties. In the *Dred Scott* Case, both the majority and the minority judges were influenced by political motives, as indicated by their written opinions in the case and particularly by their more recently available correspondence and papers relative to the decision.⁴⁰ In the income tax case a generation later, Joseph H. Choate, counsel for those who alleged the tax unconstitutional, told the justices in effect that they must stop the march of communism now or never.⁴¹ Chief Justice Fuller, speaking for the bare majority which held the statute unconstitutional, sounded hardly less like an advocate than a judge. "The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."⁴² Happily, the justices have stepped into the political arena in this fashion in only a few cases, although in numerous instances they have been under the necessity of deciding cases in which powerful contending groups had vital interests.

Political parties and the Court. More frequently, perhaps, than the Court has willingly entered into politics, the political parties have made the Court or its decisions the subject of political controversy. Both wings of the Democratic party accepted the *Dred Scott* decision in 1860, while the Republicans denounced it as "a dangerous political heresy."⁴³ In 1896 the Democratic party denounced the income tax decision of the previous year, and declared it to be the duty of Congress to use all the constitutional power which remained after that decision, "to the end that wealth may bear its due proportion of the expense of the government." It further denounced "government by injunction as a new and highly dangerous form of oppression by which federal judges, in contempt of the laws of the states and rights of citizens, become at once legislators, judges, and executioners."⁴⁴ In 1924 the La Follette Progressives not only called for a constitutional amendment which would prohibit the Supreme Court from rendering acts of Congress invalid, but they advo-

⁴⁰ C. A. and Mary Beard, *Rise of American Civilization* (1930), II, 14 ff.

⁴¹ *Ibid.*, pp. 335-336.

⁴² 157 U.S. 429, 607 (1895).

⁴³ K. H. Porter, *National Party Platforms* (1924), pp. 53, 54, 57.

⁴⁴ *Ibid.*, pp. 184, 185.

cated also a provision for the election of federal judges for a term not exceeding ten years.⁴⁵ Because the Court had overturned so much New Deal legislation, it was thought that the Court might be an issue in the campaign of 1936. But no responsible leader, excepting Senator Norris, raised his voice during the campaign against judicial review or judicial conservatism. Whatever the charge might be against the Supreme Court, that charge is commonly regarded as a dangerous campaign issue—dangerous because millions who understand very little about the processes of government have a deep reverence for the Supreme Court. Indeed, they may not know the difference between the Supreme Court and the Constitution, and in that ignorance they have wisdom, for the Constitution is what the Court says it is; or, to use the words of an irreverent critic, "The Constitution is the Supreme Court's last guess."

President Franklin D. Roosevelt's proposal. With popular support for him at a new peak, the President, on January 6, 1937, in an address to Congress, declared: "The judicial branch also is asked by the people to do its part in making democracy successful." Some of the people's representatives in Congress then busied themselves with plans to limit the jurisdiction of the Supreme Court, to require more than a mere majority of the Court to declare a law unconstitutional, and with other plans to restrain the Court. On February 5 the President announced his plan. There were several problems relating to the judiciary which were discussed in his message and embodied in the draft of a bill which he sent to Congress, but the kernel of his plan was that he be authorized by law to appoint additional judges, in all federal courts, where there are incumbent judges of retirement age who do not choose to retire or resign. (Any judge who has served ten years and attained the age of seventy is now eligible for retirement on full pay.) The President's main purpose, of course, was to reach the judges in the Supreme Court, and the draft bill provided that the number of judges in that tribunal might be increased from nine to as many as fifteen if its septuagenarians failed to retire. Six new justices named by the President would have assured practically every New Deal measure a safe passage through the Supreme Court.⁴⁶

The President's proposal immediately raised a great controversy.

⁴⁵ *Ibid.*, pp. 516-517, 519, 520.

⁴⁶ This is fairly well demonstrated by a glance at the fate of New Deal measures to January, 1937.

Hot Oil (Sec. 9c, N.I.R.A.)	void	8-1
Gold Clauses	valid	5-4
Railroad Pensions	void	5-4
Farm Mortgages	void	9-0
N.R.A.	void	9-0
A.A.A.	void	6-3
T.V.A.	valid	8-1
Guffey Act	void	6-3
Municipal Bankruptcy	void	5-4

Against his plan assembled the millions who believed that the Court decides all of its cases according to the clear meaning of the Constitution. This group was substantially reinforced by those who were satisfied with the decisions of the Court, although this group knew that the personal opinions and convictions of the judges entered into those decisions. Another opposition group, while agreeing with the President that the Court should be brought more into line with current developments felt that his plan offered only a temporary solution. Still others opposed the plan because they considered it unfair, believing that it should have been disclosed during the preceding presidential campaign. The President had many sincere supporters and some who backed his proposal only for political reasons. The popular opposition was too strong, however, and he lost the battle.

THE NEW SUPREME COURT. But the President did not lose the "war." Time, "inexorable and remorseless," gave him the victory in the death or resignation of Justices who found in the Constitution clauses with which to entangle and choke some of the major statutes of the New Deal. Indeed, a few months after the President proposed his court plan, and before there had been any change in the personnel of the Supreme Court, that tribunal crossed over to the liberal side on the question of the constitutionality of minimum wage laws for women and children.⁴⁷

To succeed Justice Van Devanter the President nominated Hugo L. Black, a Senator from Alabama and one of the leading advocates of Administration policies in the Upper House. The Department of Justice, following its usual practice, had prepared a list of some sixty men, eliminated about two-thirds of them because in their private lives or public activities they had failed to measure up to the 1937 requirements for high judicial office, and submitted the remaining twenty names to the President, who had the official responsibility of choosing a name to submit to the Senate for confirmation or rejection. The President finally decided upon Hugo L. Black. Perhaps it was not generally known, or had been forgotten, that Senator Black had formerly been a member of the Ku Klux Klan. At any rate, a special brand of "Senatorial courtesy" seems to presume that "every Senator is a witness to the irreproachable character of every other Senator"⁴⁸ and that any senator is therefore entitled to confirmation for any post to which he might be named by the Chief Executive. Following the confirmation, Justice Black's earlier association with the Klan became common knowledge and there were many indignant protests against his taking a place on the Supreme Bench. It is fair to say, however, that Justice Black, by his work on the Court, appears to have lived down his regrettable affiliation with an "un-American" organization

⁴⁷ In *Morehead v. New York*, 298 U.S. 587 (1936) the decision was 5-4 against their constitutionality, and this was changed to 5-4 for constitutionality in *West Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Justice Roberts having changed sides.

⁴⁸ *Time*, August 23, 1937, p. 13.

and that any blame for possible mistakes incident to his appointment should be apportioned between the Executive branch of the Government and the Senate.

President Roosevelt had occasion to appoint six other Associate Justices of the Supreme Court, and when Chief Justice Hughes resigned, the President named Associate Justice Stone as his successor. This last appointment is of interest when it is recalled that Chief Justice Stone is a Republican who was appointed Associate Justice by his old friend Calvin Coolidge; but even a cursory glance at the record of the present Chief Justice makes his promotion quite understandable—his views on constitutional questions are liberal enough for President Roosevelt. There is no doubt at all that the President now has a “friendly” Supreme Court. The New Deal has had no judicial set-backs since 1936. What does it all come to? Simply this: That any party or faction in control of the political branches of the government for six or eight years will also be able to bring the Supreme Court into general accord with its policies. The Federalists had the Court in their day; the Southern slavocracy (the dominant wing of the Democratic party before 1860) had the Court in its day; powerful business interests who dominated the Republican party after the Civil War, had the Court in their day; and at present the Roosevelt wing of the Democratic party has it. This is not shocking. It could hardly be otherwise. As long as the Supreme Court decides questions of major policy (as it does through its power to pass upon the constitutionality of laws) parties and interests in power will seek to control, and eventually will control, the Supreme Court. An intelligent man will not tear his hair when he finds the Supreme Court reflecting the general tone and spirit of the dominant political power. He will be concerned only when he observes political efforts to influence decisions in specific cases.

VI. FEDERAL JUDGES

Appointment of judges. In concluding the survey of the regular federal courts, something should be said concerning the appointment and character of the judges. As previously stated, they are appointed by the President with the advice and consent of the Senate. A senator of the President's party from the state in which a district judge is to be appointed commonly names the person whom the President appoints. Various motives, personal and political, govern the senators in their selections; but they usually recommend men of character and competence. Occasionally, the Attorney General may advise the President that a candidate so recommended does not measure up to the high standards required in the federal judiciary; but even then, a senator may stand on the rule of “senatorial courtesy,” thus forcing the appointment of his own candidate

or none at all.⁴⁹ A rather unusual case was presented in February, 1931, when President Hoover, acting upon the advice of the Attorney General and bar associations, refused to recommend to the Senate a candidate proposed for a Minnesota district by Senator Schall.⁵⁰

In the appointment of judges for the higher courts, particularly for the Supreme Court, individual senators have less voice than in the district appointments. But, as will be shown in the next paragraph, this does not mean that politics is absent from consideration in making appointments to the higher judicial positions. It is seldom that the Senate fails to confirm a judicial appointment, and partly for this reason its rejection of John J. Parker⁵¹ for the Supreme Bench in 1930 created the widest interest. The same year, a number of senators expressed strong opposition to the confirmation of Mr. Hughes as Chief Justice, because they considered him too conservative; but the nomination was easily confirmed, and as Chief Justice he demonstrated that he was not so conservative as his critics supposed him to be. In nearly all cases, the judges appointed belong to the President's party,⁵² and, what is more important, they usually belong to the school of political and economic thought that is dominant at that time.

Character of the judges. While it is true that political considerations are by no means absent in the selection of judges, the baser political practices in connection with judicial appointments have been exceptionally few in number. Justices of the Supreme Court have been, almost without exception, men of the highest integrity and ability and free from political bias. A few of the judges of the inferior courts have failed in their trust—one was sent to the penitentiary for "selling" justice—but the percentage is very low, perhaps lower than one per cent. No position in America carries greater respect than a federal judgeship. Few indeed are the able lawyers who will decline an appointment as district judge, and a place on the Supreme Bench is most highly prized by the finest legal talent the country can produce. Our federal judges are quite superior to the general run of state judges, and compare most favorably with the judges in any country, not excepting Great Britain.

Yet legal talent and character, indispensable as they are, do not of themselves make great judges, not even able judges in this complex society. Judges should understand business, labor, social problems and every other major aspect of modern society. Few of them do. Law school training and legal practice do not give the whole picture of society, although it is a

⁴⁹ On Senator Glass' use of senatorial courtesy, see Ch. 10, Sec. V.

⁵⁰ *Time*, Feb. 9, 1931, p. 13; and March 2, p. 11.

⁵¹ He was charged with race prejudice, hostility to labor, and "conservatism."

⁵² Recent exceptions to this rule occurred when President Hoover named Benjamin N. Cardozo, a Democrat, Associate Justice of the Supreme Court, and when Roosevelt named Associate Justice Stone, a Republican, Chief Justice.

pleasure to report that some law schools are now making efforts to broaden their training. The successful lawyer who comes to the bench from his practice may know little of the broad fabric of life and he may know well only one branch of the law. It is probable that men who have served as professors of law, as administrative officials, or as legislators are better qualified for judicial office than railroad attorneys or mining lawyers. At any rate, we are likely to find out, because the present tendency is to elevate to the bench men who have had the broader and more general training and experience.

SOME GREAT SUPREME COURT JUSTICES. Among the justices of the Supreme Court, Chief Justice Marshall (1801-1834) is commonly accorded first place. Presiding over the court before our national institutions had taken shape, he had free range to use his great talents in interpreting the Constitution in such a way as to give the national government wide powers. Firm in convictions, masterful in logic, and lucid in style, many of his decisions are not only great landmarks in constitutional law but classics in English prose as well. Chief Justice Roger B. Taney (1836-1864) does not hold a high place in the opinion of the average person because he was the author of the Dred Scott decision, but some students of constitutional law place him next to John Marshall.⁵³ Of the associate justices, certainly Joseph Story, Stephen J. Field, and John M. Harlan should be mentioned. Oliver Wendell Holmes, probably the most beloved man who ever sat in the Court, served from 1902 to 1932, resigning in his ninety-first year. As philosopher, statesman, and judge, he was famed throughout the English-speaking world.⁵⁴

Salaries and retirement allowances. A district judge receives a salary of \$10,000; a circuit judge, \$12,500; an associate justice of the Supreme Court, \$20,000; the Chief Justice, \$20,500. The salaries are fixed by Congress, subject to the constitutional limitation that the compensation of no judge shall be decreased while he continues in office. Considering the quality of federal judges, the salaries are rather low. It is easy to find judges who could make their judicial salaries several times over in the practice of law. Judges hold office for life⁵⁵ and may be removed only by impeachment. Liberal provision is made for the retirement of judges. Any judge who has served ten years may retire at the age of seventy on full pay, although retirement is not compulsory and can be made so only by Constitutional amendment.

Other court officers. For each federal district, there is appointed by the President and the Senate an attorney, who in turn, with the approval of the Department of Justice, appoints his own assistant attorneys. Their

⁵³ See Chief Justice Hughes's tribute to Taney, *New York Times*, Sept. 27, 1931, p. 8, and editorial, same, Oct. 4, 1931.

⁵⁴ H. J. Laski, "Mr. Justice Holmes," *Harper's*, March, 1930, pp. 415-423.

⁵⁵ Judges not appointed under the judiciary article of the Constitution (judges in the territories, for example) may be appointed for a term of years.

duties are to prosecute all delinquents for crimes and offenses under the laws of the United States and to represent the United States in all civil actions to which it is a party. In like manner, there is appointed for each district a marshal, who is required to attend the district court and execute its orders. Marshals and their deputies have the same powers in each state in executing the federal laws as the sheriffs and their deputies have in executing the state laws. Each court has also a clerk and necessary assistants, a commissioner (who conducts the preliminary hearing in criminal cases and decides whether an accused shall be held for grand jury), and probation and parole officers. Referees in bankruptcy are regularly appointed to handle the details of bankruptcy cases. The Supreme Court appoints a marshal, a clerk, a librarian, and a reporter of its decisions, and appoints or authorizes the appointment of necessary assistants to these officers. Each justice of the Supreme Court is allowed a law clerk.

VII. SPECIAL COURTS ⁵⁶

Courts for special areas. The Supreme Court, the circuit courts of appeals, and the district courts are the regular tribunals in the federal judicial system. They are sometimes called "constitutional courts" by way of emphasizing the fact that they were established under Article III of the Constitution and exercise the judicial powers enumerated in that article. There are other courts which have been established, not under the authority of the judiciary article, but under the authority of Congress to legislate exclusively for particular areas. Such courts are often designated "legislative courts." The United States Court of Appeals for the District of Columbia and the District Court of the United States for the District of Columbia derive their powers both from Article III and from the constitutional authority of Congress to make all laws for the District of Columbia.⁵⁷ Courts in the territories are established not under the provisions of Article III but under the authority of Congress to make all rules and regulations for the territories. Consular courts have been established by treaties with certain countries whose legal systems differ so materially from our own that our citizens experienced some difficulty in resorting to the foreign courts. Under the authority of our "extraterritorial" treaty with China, Congress established a United States Court for China, giving it original jurisdiction in important cases and appellate jurisdiction with respect to the minor cases tried in the American consular courts in China. Judges of the courts named above, excepting those of the District of Columbia, not being judges within the meaning of the judiciary article, are not necessarily appointed, paid, and removed in accordance with the provi-

⁵⁶ W. G. Katz, "Federal Legislative Courts," *Harvard Law Review* (1930), XLIII, 894-924; Willoughby, *op. cit.*, pp. 529-532; *Am. Pol. Sci. Rev.* (1934), XXVIII, pp. 45-46.

⁵⁷ *O'Donoghue v. United States*, 289 U.S. 516 (1933).

sions of that article. Thus, the judge of the court in China is appointed for only ten years, and he may be removed by the President for cause.⁵⁸

Courts for special cases: 1. COURT OF CLAIMS. There are certain legislative courts of special jurisdiction. One of these is the Court of Claims, established as long ago as 1855. Any contractual claim an individual may have against the United States may be brought to this court, although, if the amount involved is not more than \$10,000, the district courts have concurrent jurisdiction. Cases may also be referred to the Court of Claims by Congress or by any of the executive departments. If a case so referred is one over which the court has jurisdiction by law, it disposes of it as it would handle a case brought by an individual; if not, the court simply makes a report to Congress or to the department which asked it to investigate a claim. It should be emphasized here that the only claims one may bring against the United States are those on contract, express or implied. The United States is immune from the ordinary civil suits to which individuals and corporations are liable.

2. COURT OF CUSTOMS AND PATENT APPEALS. The Court of Customs Appeals was created in 1909 under the authority of Congress to regulate commerce. Its title was lengthened in 1929 when it was given jurisdiction to hear appeals from the Commissioner of Patents. In addition to this new duty of hearing patent appeals, it has its old duty of hearing and deciding appeals made from the United States Customs Court.

3. UNITED STATES CUSTOMS COURT. This last-named court (known until 1926 as the Board of United States General Appraisers) has original jurisdiction over cases arising out of the collection of the customs revenue. It holds its sessions in New York City.⁵⁹

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⁵⁸ In 1943 the United States gave up its extraterritorial privileges in China.

⁵⁹ The Court of Claims has a chief justice and four associate judges—salary, \$12,500; the Court of Customs and Patent Appeals, a presiding judge and four associate judges—salary, \$12,500; the United States Customs Court, a chief justice and eight associate judges—salary, \$10,500. All of these judges are appointed by the President with the consent of the Senate. Each court has the necessary marshals, clerks, and reporters. The Court of Claims has, in addition, six commissioners and certain other officers.

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The State Judicial System



The state courts are of much more concern to the average person than the federal courts; for the former have jurisdiction over a much wider variety of cases than the latter, and they enter much more into the daily affairs of the people. In no division of our political system does the fact that the federal government is one of the delegated powers and that the states retain all the other powers, stand out more clearly than in the judiciary.

I. ORGANIZATION AND JURISDICTION OF STATE COURTS ¹

Types of courts. The courts in practically every state are established by the state constitution and by legislative acts in pursuance thereof. The judicial structure in its fundamental aspects is essentially the same in all the states, although the details vary considerably. Every state has a highest court of appeals, many have intermediate courts of appeals, all have various local courts of original jurisdiction, and all have minor courts.

1. **THE SUPREME COURT.** The highest court in the state is ordinarily styled the "supreme court"; but it also goes under such titles as the "supreme judicial court," "supreme court of errors," and "court of appeals." The number of justices varies from three to nine. Because of the pressure of business before the courts, there is a tendency to increase the number and permit them to sit in separate divisions, thus expediting the handling of cases. Supreme courts have very little original jurisdiction, their work being confined almost entirely to the hearing of appeals. In some states, appeals lie to the supreme court from the intermediate courts of appeals only; while in others, appeals may be made from some of the lower courts. It is a rather common practice in the states to allow appeals to the supreme court only if the amount involved exceeds a certain sum, final decision in lesser cases being made by the intermediate courts. Supreme courts are always given ultimate jurisdiction in all cases requiring an interpretation of the state constitution; and, subject to review by the Supreme Court of the United States, they may interpret such parts

¹ Material in this section is drawn chiefly from C. N. Callender, *American Courts* (1927), Ch. II and Appendix. See also Bates and Field, *State Government* (1939 ed.), Ch. XV, and W. B. Graves, *American State Government* (1941 ed.), Ch. XVI.

of the Federal Constitution, laws, and treaties as may come before them. Indeed, it is the duty of all state courts to apply the Federal Constitution and laws to appropriate cases.

Judicial review. In interpreting either the state or Federal Constitution, the state supreme court² may exercise the power of judicial review; that is, it may pass upon the validity of a statute of the state legislature under either of these instruments. A state court may even pass upon the validity of provisions of the state constitution if the question of their being in violation of the Federal Constitution is raised. This authority to declare null and void state laws and provisions of state constitutions has been used rather freely by the state courts, perhaps more freely than by the federal courts. Because of the detailed provisions of state constitutions and particularly because of the many restrictions they impose upon legislatures, those bodies must move with great circumspection in order to avoid the enactment of unconstitutional measures. They do not always so move. Indeed, sometimes they quite frankly pass a measure of questionable constitutionality and leave the responsibility with the courts. The rather vague and indefinite provisions relative to "due process of law" and the "equal protection of the laws" appear in state constitutions as well as in the Federal Constitution, and the state courts have voided many laws under these provisions. In so doing they have not infrequently been charged with conservatism, reaction, and reading their own theories into the constitutions—the charges made against federal judges. As a result of these criticisms, several states have by constitutional provisions prohibited the supreme courts from nullifying a law unless two thirds, or even a higher fraction, of the judges concur.

Advisory opinions. By constitutional provision in six states and by custom in one or two others, the supreme court is required to give advisory opinions when requested to do so by the governor or legislature.³ Such an opinion is not ordinarily requested except upon an important matter. When given, it is not considered as having the weight of a judicial precedent, inasmuch as the court hears no opposing arguments and decides no actual case.⁴ These opinions are probably given a weight which falls between the opinions of an attorney general and court decisions in litigated cases. Eminent authorities differ on the wisdom of pass-

² The obligation of state courts to void state statutes which are in contravention to the Federal Constitution is in its provision that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (Art. VI.) See also *People v. Western Union*, 70 Colo. 90 (1921). All courts are bound to interpret the constitution, but since the supreme courts have the final word, the practical result is that a law is not actually void until they so declare.

³ In Florida, South Dakota, and Vermont, when requested by the governor. In Colorado, Maine, and Massachusetts, when requested by the governor or legislature.

⁴ In Colorado, however, such opinions have the same effect as opinions given in litigated cases. *Graves, op. cit.*, p. 635 note 4.

ing this function to the courts, and the legal profession very generally opposes it.

2. INTERMEDIATE COURTS OF APPEALS. The less populous states have no appellate courts except the supreme courts; but a number of the more densely populated states have established intermediate courts of appeals, which correspond somewhat to the federal circuit courts of appeals. Some of the states have just one such court, and others have several. They are known by various titles, such as "courts of appeals," "district courts of appeals," and "superior courts." Like the supreme courts, each of these courts has several judges. Their jurisdiction varies greatly, but their purpose is always the same, namely, to carry a part of the burden of appeals for the supreme court. Sometimes their jurisdiction extends to appealed cases in which the amounts in controversy fall between a certain stipulated maximum and minimum (say, \$4,000 and \$200), cases above the maximum going to the supreme court and cases below the minimum being finally decided in a lower court. The decision may be final in some cases, and in others an appeal may lie to the supreme court. Appeals involving the constitutionality of laws, titles to state offices, felonies, and other important matters, in some states go directly from the lower courts to the supreme court, and in others must be carried first to the intermediate court of appeals.

3. COURTS OF ORIGINAL JURISDICTION. Local state courts have original jurisdiction in practically all cases of importance, and ordinarily an appellate jurisdiction in cases from minor courts. As a class they are often referred to as "trial courts" or "courts of first instance." The business before these courts may be divided into four types: civil cases at common law; equity suits; criminal prosecutions; and probate matters, that is, matters relating to wills and the estates of deceased persons. In some states, the same court may handle all types of litigation. In others, several types of courts are established. Thus, Illinois has circuit courts of original jurisdiction in civil and criminal cases in each county; city courts having concurrent jurisdiction with the circuit courts; a Superior Court of Cook County (in which Chicago is located), having concurrent jurisdiction with the circuit courts; a Criminal Court of Cook County, which exercises in that area the ordinary criminal jurisdiction of the circuit courts; a Municipal Court of Chicago, having practically concurrent jurisdiction with the circuit courts except in equity suits and felonies; probate courts for counties of over 70,000 population; and county courts, with probate and certain other jurisdiction.⁵ The courts of original jurisdiction have various titles—"superior," "circuit," "district," and others—which do not always indicate the nature of their jurisdiction.

⁵ Callender, *op. cit.*, p. 246.

4. **MINOR COURTS.** Below the ordinary courts of original jurisdiction, there are courts which have original jurisdiction in petty cases. While these may be designated as minor courts, they are not of minor importance, since the great majority of persons who go or are brought to court are concerned with trivial cases only. The office of justice of the peace had its origin in England centuries ago, and it has been an established institution in America from the beginning. In Britain the justice of the peace has jurisdiction in petty criminal cases only; but in America he may hear small civil cases as well, subject usually in both types of cases to appeal. In major criminal offenses, he may hold preliminary hearings and have accused persons held in custody. In addition to his judicial duties, the justice of the peace may perform marriage ceremonies and attest formal documents. In some of the Southern states the justices as a group serve as county administrative boards. Long since, the justices of the peace were found insufficient for the requirements of justice in the cities, and they have usually had to give way to city courts or at least share their jurisdiction with them. The city police court is now a well-known institution which ordinarily has the power to dispose of cases of traffic regulation and other minor offenses. Often a separate court in a city, commonly designated a "municipal court," has jurisdiction in the smaller civil cases. In general, it may be said that the city courts are given wider jurisdiction than the justices of the peace. This is as it should be; since the city magistrates are usually learned in the law, while the same cannot be said for the historic justices. Several other courts—claims (against the state), juvenile, domestic relations, conciliation, and small (private) claims—have the rather special type of jurisdiction indicated by their titles. Some of these will receive brief mention in another section of this chapter.

The lack of judicial organization. State courts were originally organized to meet the relatively simple needs of a rural society. As the country grew and an industrial civilization with all its complexities became established in most of the states, great changes in judicial organization were needed. There was a need for more courts, more judges, better systems of gathering and correlating judicial statistics, and, above all, for organization of the courts into a unified system. More courts were created and more judges were provided for from time to time; but that was as far as the legislatures usually went in meeting the new needs. As a result of this halfway program, the judicial system became more disorganized than ever. Some districts had more courts and judges than were needed; some had too few; and there was no higher court or administrative body with the authority to make proper adjustments. Furthermore, since there was no central judicial authority to make the rules of the courts, they were made by the legislatures, a task for which such bodies are not well fitted. In short, cumbersome and inflexible organization, and rigid and ill-suited

rules of procedure prevented, and to a large extent still prevent, the courts from performing their true function of administering justice speedily and free from unnecessary technicalities.

PROPOSED REMEDIES. A number of remedies have been designed for the improvement of judicial organization in the states. Space permits only a brief consideration of two of the most promising of these—the unified court system and the judicial council.

The unified court system. Under this system all of the courts of the state would be organized as divisions or branches of a single, large judicial body. The chief justice or some other appropriate official would supervise the work of this consolidated court. Such a judicial system would make possible a division of judicial labor among various types of courts—civil, criminal, equity, and probate; the assignment of judges to tasks for which they are especially competent; dispatch in the settlement of cases; and the attainment of the goal that courts exist primarily for the benefit of litigants. A rather high degree of unity may be brought about without complete unification of the courts. This may be done through an administrative judge with power to assign judges to congested courts and to counsel with them on judicial problems. Massachusetts, Ohio, several other states, and a few large cities have made progress along this line.

The judicial council. Back in 1921 the Model State Constitution carried a significant proposal that the states set up judicial councils. What is more, the proposal has borne fruit, more than thirty of the states having adopted it in some form. These councils are composed of representative judges of the various courts (the chief justice is commonly the head of the council), perhaps the attorney general, some practicing attorneys, probably a few members of the legislature, and often some laymen. The council is not a legislative or judicial body. It makes no laws, it decides no cases. Some of them have a few administrative powers, but the council must be considered primarily as an advisory and investigating body. Its administrative duties relate to the collection of statistics and other information essential to the efficient operation of the judicial system, and in some states the council may transfer judges from districts with light dockets to districts with crowded dockets. Perhaps the chief duty of the council is to make rules of general practice. During the past century a number of states gave this power to the supreme court, but with the establishment of the judicial councils, it has been thought better to transfer the power to them. If a state should continue to vest this power in the supreme court, the authorities insist that the council should be assigned the task of taking the initiative, gathering data, drafting rules, and discussing their proposals with the bar, finally passing the rules up to the court for adoption. It seems to be very generally agreed that the legislature is not the body to make rules of general practice. Another function of the judicial council is that of investigation and research. Some of

them have made rather elaborate studies and reports, reports in the form of specific recommendations to the governor or the legislature.⁶

II. STATE JUDGES ⁷

How chosen. Federal judges, as everyone knows, are appointed by the President subject to confirmation by the Senate. A similar method of appointment was used in the colonies; but during the Revolution and immediately following it, the legislatures took a larger part in the selection of judges. As the nineteenth century advanced, the democratic and pioneer influences led to the establishment of popular choice as the chief method of selection. At present, only six or seven states have their judges chosen by the governor—or by the governor subject to legislative approval, or by the governor and the judicial council; some four or five leave this function to the legislature; while more than three fourths of the states leave the choice of judges to the sovereign people.

SHOULD JUDGES BE APPOINTED OR ELECTED? Judges are supposed to stay out of politics, to be independent. The question arises as to what method of selection is least likely to bring the judiciary into politics. It is commonly agreed that choice by the legislative body is the most political of all the methods of selection, and there is no strong movement in its favor at present. The issue is rather between executive appointment and popular election. The advocates of the appointive system speak of the high quality of the English and of our own federal judges, obtained under that system; of the fact that only in the American states are judges elected. They allege that an elective judiciary must, of necessity, be a political judiciary; that candidates must lower the bench and mount the rostrum or yield the judgeships to those who will do so. It is said that the people have no notion as to the competence of candidates for judicial office; and that in districts where so many judges are elected, popular choice is bound to be a farce.

This is perhaps overdrawing the picture. The facts are that the people have often made excellent choices, and that governors have not always made wise and nonpolitical appointments. It is also true that, whether the elective or appointive method is used, the bar association, the best informed body on candidates for the judicial offices, exercises considerable influence with voters or with the governor, as the case may be. It is

⁶ Graves, *op. cit.*, pp. 612 ff. There is much literature on the subject of the judicial council and the reorganization of state judicial systems. The *Journal of the American Judiciary Society* is most valuable. For example, among the articles in Vol. XXVI, No. 2 (August, 1942) are "Crime Curbed under Michigan Rules," "New Jersey Plans an Organized Judiciary," "New Court System for Minnesota," and "Model Judiciary Article and Commentary."

⁷ Bates and Field, *op. cit.*, pp. 430 ff.; Dodd, *op. cit.*, pp. 312-319; Bruce, *The American Judge* (1924), Ch. VII; M. Dawson, "Judging the Judges," *Harper's*, September, 1934, pp. 437-448; Graves, *op. cit.*, pp. 601 ff.

further stated that, since the judges do decide political questions in passing upon the constitutionality of certain types of statutes, it is only proper that political considerations should enter into their selection. Then, too, it may be observed that the election of judges is not ordinarily attended by partisan appeals. At least a dozen states employ nonpartisan ballots for these elections, which, while they do not necessarily remove all partisan influences, nevertheless operate to reduce such influences. Not infrequently judges are re-elected solely on their records and without opposition. Yet we would be less than candid not to admit that, if partisan considerations are usually absent in the process of selecting judges, the personal interests of the candidates are almost always present, and it cannot be doubted that some candidates have made popular appeals, the effect of which has been to lower the prestige of courts and even threaten the independence of the judiciary. It is even a fact that some judicial nominations have been bought and paid for. There are some methods of selecting judges which are decided improvements over those commonly employed. One of the best of these shall have attention.

The Missouri plan of judicial selection. In 1940 this state, following somewhat the system established six years earlier by California, adopted a plan which provides that whenever a vacancy exists in the supreme court, in the courts of appeals, and in certain other courts, a nominating commission, composed of both lawyers and laymen, shall nominate three candidates, and the governor must appoint one of these nominees. After serving twelve months this judge goes before the people upon his record and with no competing candidate. The question for the voters to decide is: Shall he continue in office? The people vote on the same question in reference to any judge whose term of office is about to expire. In the event a majority of the votes are cast against continuance in office, the nominating commission gives the governor a new list of nominees, the governor makes a new appointment, and after the judge has served for one year, the people vote on the question of his continuance in office. It will be noticed that this plan is designed to provide a method of appointment which is relatively free from politics and, at the same time, to reserve to the people the right of ultimate control. This method of selection is not greatly at variance with the plan proposed in the Model State Constitution, and it appears to meet with the warm approval of many leading members of the American Judicature Society.

The political struggle through which the state of Missouri passed in securing this plan should not be passed by. In 1940 the people adopted the amendment which provided for it by a majority of 95,000 votes. Near the end of the next session of the legislature, the time when deals are most commonly made and the will of the people flouted, the legislature proposed an amendment to repeal the amendment adopted in the previous election. In November, 1942, the people turned down this repeal amend-

ment by a majority of 173,000. The increased majority by which the people of Missouri expressed themselves in favor of removing judges from politics was a tribute to their intelligence and their interest in good government, and it was also a testimonial to the effectiveness of civic leadership on that question.⁸

Terms of judges. The independence of judges is commonly considered as being determined not only by the method of selection but also by the length of their terms. The terms vary a great deal in the several states and within the individual states. The highest justices almost invariably hold the longest terms. Their term is for life in Massachusetts, New Hampshire, and Rhode Island; twenty-one years in Pennsylvania; fifteen years in Maryland, fourteen years in New York; and a lesser number of years in other states, eighteen placing it at six years. Judges of the lower courts commonly hold office for shorter terms than the higher judges. Thus in Illinois, justices of the peace and other members of the minor judiciary serve for four years, the judges of the regular trial courts for six years, and the supreme court judges for nine years. There is no doubt that the long term increases the independence and learning of a judge, and in a number of the states the terms have been lengthened in recent years. The practice of re-electing competent judges, which obtains in several states, serves as a fairly good substitute for the longer term.

Quality of state judges. State judges are almost invariably selected from the bar. The duties of the practitioner and the judge are really quite different, and in some countries there is a definite distinction between the two. In France, for example, young men are trained as lawyers or as judges, and the judicial profession is filled by those who have special training for it. No doubt our system has certain advantages over that of the French; but the fact remains that the duties of the advocate and the judge are different and that when a lawyer becomes a judge he must take himself in hand for some very important readjustments. As an attorney, he was a partisan, a talker, probably a specialist, and possibly unconcerned about the broader social problems of the state. As a judge, he must be an arbiter, a listener, learned in the whole field of the law and conversant with economics, history, and sociology. He must strive to gain a "full sense of the seamless web of life." He must become a "statesman as well as a jurist, thinker as well as lawyer."⁹

Manifestly it is exceedingly difficult, even under the most favorable circumstances, to find men who measure up to this standard; and it is not surprising that politics in selections, short terms, and inadequate salaries often produce state judges who are far below it. Indeed, in some states, judicial office, particularly that of trial judge, is not at all attractive to the

⁸ John Perry Wood, "Missouri Victory Speeds National Judicial Selection Reform," *Journal of the American Judicature Society*, XXVI, 142 (February, 1943).

⁹ H. J. Laski, "Mr. Justice Holmes," *Harper's*, March, 1930, p. 415.

best legal talent, and it not infrequently goes to second-class men or to young men who may hope to use it as a stepping-stone to a later lucrative practice. Although, broadly speaking, state judges are less likely than federal judges to be learned and independent, it should be said that a few states have maintained very good judicial standards. Cooley of Michigan, Doe of New Hampshire, Holmes (appointed to the Supreme Court of the United States in 1902) and Shaw of Massachusetts, Mitchell of Minnesota, Winslow of Wisconsin, and Kent and Cardozo (the latter appointed to succeed Justice Holmes in the Supreme Court of the United States in 1932) of New York, to mention only a few notable state judges, certainly belong to a select company of statesmen-jurists.

Salaries. The salary of judges is fixed by the constitution in a few states; but usually it is very sensibly left to the legislatures to decide, subject to a few constitutional limitations. Adequate salaries are paid in some states, but in others the scale of compensation is rather low. A salary of \$8,000 for supreme court justices and \$5,000 for the judges in the courts of original jurisdiction may be taken as fairly representative. Federal judges and British judges receive more, and they have some additional compensation in the assurance of life tenure. It is fair to assume that more liberal salaries would elevate the standards of the state judiciary; for at present, in many states, competent men are loath to give up lucrative private practice for the relatively small compensation allowed judges. Some progress is being made in the direction of increasing the salaries, and several states have made provision for pensions upon retirement.

Removal of judges. Judges may be removed by impeachment in every state; but, as political squabbles which commonly attend impeachment proceedings are so out of keeping with the nature of the judicial office, this method of removal is rarely used. Furthermore, impeachment requires a trial and a conviction for a specific offense. A more satisfactory method of removal, employed in a number of states, provides that the governor may at his option remove a judge upon address by both houses (usually a special majority) of the legislature. No trial or conviction is necessary, thus enabling the political authorities to remove a judge who is just "no good." About twelve states authorize the removal of judges by a special majority of both houses, leaving the governor no part in the matter. A more modern method of removing judges is by the recall. Only twelve states have authorized the use of the recall for elective officers generally, and four of these have excepted judicial officers from this method of removal. It was argued that the recall of judges would deal a terrible blow to the independence of the judiciary; that judges would be recalled every time they gave decisions which ran counter to the will of a bare majority of the voters; that the recall of judges meant, in effect, that the people would set themselves up as judges. As a matter of fact, the people have shown great restraint in the use of this emergency weapon.

No supreme court justice has ever been recalled. Only a few inferior judges have been so removed and these almost without exception for personal delinquencies rather than for unpopular decisions. Whatever theories may be advanced against the popular dismissal of judges, experience has demonstrated thus far that the judiciary is in no particular danger from this source.

Other court officers: 1. **CLERK.** The judges are, of course, the most important officers of the court; but there are certain other officers who are hardly less important.¹⁰ There is always a clerk (sometimes elected, and sometimes appointed by the court), whose duty it is to keep the records, to issue writs or other processes incident to litigation, to give certified copies of court documents, and to perform other court duties of a ministerial character.

2. **PROSECUTING ATTORNEY.** The prosecuting attorney (known also by various other titles such as "state's attorney," "county attorney," and "prosecutor"), a county officer commonly elected, is a familiar figure about the trial courts. He serves as counsel for the grand jury, aiding it in preparing indictments; and in many states he may bring an accused person to trial without going through the formality of securing an indictment from a grand jury. He must conduct the prosecution of all offenders in the name of the state. It is clear that the activity of this officer determines very largely the degree of law enforcement a county will attain. Some prosecutors have winked at lawlessness, or at certain types of offenses; others, frequently young lawyers, have made records as prosecutors, and steadily climbed the political ladder from that first round. The prosecuting attorney also represents the state and the county in civil suits to which they happen to be parties and he acts as a legal adviser to other county officers.

3. **SHERIFF.** The sheriff¹¹ is another important county officer usually elected by the people. A powerful and somewhat romantic figure in the English counties centuries ago, he now has only a few administrative duties to perform in that country. In the American county he must, as far as possible, prevent breaches of the peace, and arrest offenders; serve the writs issued by the courts; summon juries; execute the court's judgments; administer the county jail; and discharge other duties imposed by law. He is usually assisted by a number of deputies. A constable, commonly elected, serves the justice of the peace somewhat as the sheriff serves the ordinary courts of original jurisdiction.

4. **CORONER.** Still another ancient county officer, prevailingly elective, is that of coroner; but, unlike the sheriff's office, it has declined considerably in importance. Indeed, some states have transferred a part or all of

¹⁰ On these officers, see J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930), Ch. VIII.

¹¹ From the old "shire-reeve," chief officer of the county in Saxon times.

the coroner's duties to other officers, usually medical examiners. For example, Connecticut provides for examiners who shall be "able and discreet" men, learned in the science of medicine. The examiner shall "without delay repair to and take charge of the body" of any person who comes to "a sudden, violent, or untimely death." If the examiner believes such person has come to his death by a criminal act or through the fault of others, he notifies the coroner, who then holds an inquest.¹² In most states, however, the whole matter is left to the coroner. He must investigate with the aid of a coroner's jury and perhaps a physician. The coroner instructs the jury as to the law; the jury decides the facts. The jury may thus officially accuse some person of murder; the coroner may then order the arrest, if such person is not already in custody. Clearly, the work of the coroner is of such a technical character that in those states which require no special qualifications for the office or give the coroner no expert assistance the duties are poorly performed.

III. THE LAW ADMINISTERED BY STATE COURTS ¹³

The common law. The student is familiar with the fact that the laws of the states consist very largely of the common law (often called simply "law") and equity, which the colonists brought over from England. To be sure, this legal heritage has been changed by statute, more in some states than in others; but the basic principles of the English system still apply in the American states, except in Louisiana. It is highly desirable to have an understanding of just how this English law developed and of how it came to be our law.

ITS ORIGIN. After the Norman Conquest and particularly during the reign of Henry II (1154-1189), the rather diverse systems of local law and judicial administration gave way to a centralized system. Justices were sent out from London "on circuits," and they held court in the various counties, acting under the authority of the king. In deciding the cases which came before them, they ascertained what the local customs were and ordinarily applied them in their decisions. Back in London, these justices no doubt related their experiences among themselves with mutual profit. On circuit again, a judge might have a case dissimilar to any he had decided before, and, furthermore, a controversy on which the customs of the community seemed conflicting, or, if uniform, contrary to justice. What did he do? He recalled that one of his brethren had a similar case a few months before; he followed the decision of his brother judge. And so it went on, the judges applying the customs of the communities where they seemed to do justice and using each other's decisions as precedents

¹² See Fairlie and Kneier, *op. cit.*, pp. 151-152.

¹³ Graves, *op. cit.*, Ch. XV; F. A. Ogg, *English Government and Politics* (1936 ed.), Ch. XXV; Roscoe Pound, "Common Law," *Encyclopaedia of the Social Sciences*, IV, 50.

in other cases. In the course of time, a body of law *common* to the whole kingdom was developed. As the years passed, the judges came to rely much more upon earlier decisions than upon the customs of the communities. Finally, and long before the English colonies were planted in America, previous decisions rather rigidly established the principles to be followed in later cases. It must not be understood, however, that the law became absolutely fixed. One of the glories of the common law is that it has always submitted to gradual changes. But the trouble has been that the changes come just a little too gradually.

Equity. As already stated, the common law became too rigid. One could get redress only through the use of writs, which were limited in number and very technical in form. For many an injury there was no writ, and no writ meant no remedy. For example, there was no writ which would cover a breach of an ordinary oral contract, leaving such contracts to be broken with impunity. Again, if one lost title to his land by the fraud of another, the common law afforded him no remedy. In any case, the common law provided a remedy only after damage had been suffered. This was a major defect, since it is obvious that for many injuries the payment of damages, however large, is no adequate compensation. Something was needed to supplement the common law. This was found in *equity*. It came about, in this way. Since the courts were the king's courts and acted under his authority, a person who failed to get justice in them turned to the king with his complaint. As an act of grace, the king might grant the relief prayed for. These petitions became so numerous that the king referred most of them to his chancellor and chaplain, "the keeper of the king's conscience." In the fourteenth century a special court, the court of chancery or equity, was permanently established for such cases. But let us not suppose that the chancellor and other equity judges had no other guide than conscience. Very soon equity came to have its own system of rules and remedies, and they are now hardly more elastic than those of the common law. It nevertheless continues to supplement, and at certain points to overlap, the common law. One other important fact should be noted. It is, that "law" and "equity" combined long since fell short of the needs of advancing civilization. They both remain, to be sure; but they have been modified and supplemented by acts of Parliament as often as that body has felt changes to be necessary.

Common law and equity in the states. As shown above, the English colonists carried the English system of law to America and to all other new lands in which they settled. The American Revolution did not change the law in the states. Indeed, it may be said that our courts applied the common law more whole-heartedly after the Revolution than before, although certain principles which seemed inapplicable in America were never enforced here. Even now, our courts frequently consult the decisions of British courts in common law cases. In like manner,

the courts of Britain sometimes turn to American decisions. In neither case, however, are the decisions of the courts of one country binding in the other; but they have great influence. The principles of equity, with certain modifications, also came into our legal system from Great Britain. In England, law and equity are still administered in separate courts; in America, they are administered by the same courts except in a few states.

Some examples. In order to make the distinction between law and equity clear, we shall take a few examples of how the two operate in civil controversies in the states. Suppose A has been ousted from his land by B. A has a remedy at common law. He may recover his land through an action of ejectment. A may also claim damages from B because B temporarily deprived him of his rightful possession. Suppose C breaks a contract with D. For this breach of contract, C may be sued at common law. Taking one other example, suppose E has through his negligence caused F a personal injury. F may sue E for damages at common law. Now, suppose A conveys a piece of land to B, and in the deed the area of the land is incorrectly described. The common law does not afford an adequate remedy; but equity will compel A to execute a new deed correcting the mistake. Suppose C has secured a contract with D through fraudulent devices; the common law damage suit is again no adequate remedy. But in a court of equity, D may prove the fraud and have the contract cancelled. On the other hand, suppose E has entered into a perfectly valid contract with F to sell him a particular piece of property. If E fails to make delivery, F may sue him for damages at common law. Now, F may have a very special use for that particular piece of property—no other will serve his purpose. What he wants, therefore, is the property, not the insufficient damages he might get at law. He goes to a court of equity, and that court will command E to deliver the property in accordance with the contract. For the final illustration, take the case of a property owner who is about to extend his house beyond the building line and seems to be about to cut down one of his neighbor's fine trees. The neighbor will hasten to an equity court and secure an injunction against the adjoining property owner. He might wait until the damage is done, and then sue at common law; but he wants his property preserved, not damages for its impairment or destruction. It should now be clear that equity fills in two very big gaps in the common law: it provides for relief against threatened wrongs; and it redresses certain injuries not covered by the common law.

Statutes and codes. As the inadequacies of common law and equity led the British Parliament to supplement them by statutory law, so the American states have, in varying degrees, supplemented and changed them by statute. A number of states have enacted complete codes dealing with particular fields of law. It is sometimes said that the code abolishes the common law: but the code almost invariably draws very heavily from that

law and is construed in the light of the common law. What the code actually does, in addition to making certain changes in the law, is to bring together all the laws on a given subject, as distinguished from the common law method of leaving them scattered about in thousands of judicial decisions. For example, many states have enacted criminal codes putting most of the old common law crimes on the statute books, dropping a few, and adding some entirely new crimes. Similarly, a number of states have established codes of criminal procedure and codes of civil procedure. Efforts are also made to secure uniform laws among the states on such subjects as negotiable instruments and sales. This movement is sponsored by the National Conference on Uniform State Laws, a body which has drafted a number of model codes and statutes and which has had the satisfaction of seeing some of them quite generally adopted by state legislatures.¹⁴ A few states have attempted to codify the whole body of law. Louisiana practically started her career as a state with a code modeled after the French civil law. In more recent years, some other states of the South and some west of the Mississippi have adopted more or less complete codes.¹⁵

IS THE CODE DESIRABLE? While there is no doubt as to the advantages to be gained by codifying certain branches of the law, particularly by way of revising and simplifying the rules of common law pleadings and enacting comprehensive statutes on subjects which the common law covers inadequately, there is some question as to the wisdom of codifying the whole field of law. One of the reputed advantages of the code system over the regular common law system is that the former brings all the law together while the latter is found in thousands of judicial decisions—precedents. To this contention, the reply is often made that it is impossible to get every fragment of the common law in a code; that cases will arise which are not provided for in that instrument. To the argument that the code makes the law certain and definite, it is replied that the code itself requires judicial interpretation, since cases constantly arise which fall within the twilight zone of its provisions. It is said further that the code is less flexible than the common law; that under the code necessary changes must depend upon the legislature, while under the common law new cases may be fitted in and old precedents occasionally overruled by the courts themselves. Finally, it may be said that the members of the legal profession, who should know more than the rest of us about the relative merits of the code and the old common law system, generally look with disfavor upon the attempts to codify the whole domain of law.¹⁶ Teachers of law, in particular, look with more favor upon the efforts of the American Law Institute, which is engaged in the good work of restating the common law

¹⁴ Graves, *op. cit.*, pp. 745 ff. See also his volume, *Uniform State Action: A Possible Substitute for Centralization* (1934).

¹⁵ C. A. Beard, *American Government and Politics* (1939 ed.), p. 678.

¹⁶ *Ibid.*, p. 679.

upon many topics. The finished product will not be an authorized code; but it will serve to guide lawyers and judges through the more controversial domains of the law, and also to give a more modern interpretation to many common law principles.

Other law. It seems hardly necessary to mention that state courts are bound by the state constitution, which is the highest law of a state, and by the still higher law of the nation—the Constitution, acts of Congress passed in pursuance thereof, and treaties. Furthermore, administrative rules and regulations issued by executive officers under the authority of the state constitution or of the legislature have the force of law.

IV. CIVIL LAW AND PROCEDURE ¹⁷

Distinction between civil and criminal law. The law may be divided into two fields, civil and criminal. At the risk of stating the obvious, a brief distinction will be drawn between the two. A murder has been committed; a man has been robbed; a car has been stolen; a child has been kidnapped. These are a few examples of crime. The state assumes the duty of apprehending, prosecuting, and punishing those guilty of such offenses, although the victim of a crime or his relatives and friends may assist the state in some respects. A passenger has been killed in an accident; a car has been damaged through the carelessness of the driver of another car; a citizen has distracting noises and noxious fumes coming from his premises to such an extent as to disturb his neighbor in the use and enjoyment of his property; an individual has refused to pay his landlord, his grocer, or others who have performed services for him. Wrongs have been done in each case of the latter group, wrongs which are covered by law; but not wrongs of which the state will take cognizance unless the person wronged brings them to court. The distinction between criminal and civil cases is now clear. In criminal cases, the state is the plaintiff and judge; in civil cases, the aggrieved individual is the plaintiff and the state is the judge. The alleged wrongdoer in both types of cases is the defendant. It may happen that a wrong may be at the same time both civil and criminal. For example, if a grossly negligent driver injures another, the state may prosecute him for crime and the injured party may sue him for damages. Many wrongful acts belong only in the realm of morals, not being recognized by either the criminal or civil law. Thus the ordinary town gossip seldom gets within the reaches of the law; and one may, like the Publican, pass by on the other side and refuse to succor a man in distress. It must be said, however, that moral wrongs are more

¹⁷ In the discussion of both the civil and criminal law the writer has followed the excellent summaries in C. A. Beard, *American Government and Politics* (1939 ed.), pp. 679-684, 688-690; and in Bates and Field, *op. cit.*, pp. 453-457, 465-469. On procedure, Callender, *op. cit.*, Chs. V-IX, XII-XIII, has been followed. See also D. C. Lunt, *The Road to the Law* (1932).

and more being given by statute the status of legal wrongs. In fact, many people think this tendency is altogether too strong.

Civil law: 1. PROPERTY. Without going into too many technicalities, let us examine very briefly the content of the civil law. Private property is one of the basic factors of our civilization. The laws relating to it form the most important subdivision of the field of civil law. In legal theory there is no such thing as absolute ownership. For example, the state may take a piece of land from a private owner for a public building site or a road. The owner has a right to compensation and the state will compensate him, but he cannot hold "his" land against the needs of the state. What one has, then, are certain *rights* to use and dispose of property, not complete ownership. However, ownership is the term we use in common parlance and it will suffice here. Property is divided into two main divisions, real and personal.

(a) *Real*. Real property, generally speaking, consists of land and whatever is erected or growing upon it or affixed to it. An individual who buys a piece of land is said to have an *estate in fee simple*. This is the nearest thing to absolute ownership. He may use his estate as he sees fit, subject to the condition that he respect his neighbor's rights. Another form of estate is known as a *life estate*. A widower in most states has this right in the real property of his deceased wife. Similarly, a widow has a life estate in a part of her deceased husband's real property. One who has a life estate may not, of course, will it to another, that being a right held only by the owner in fee simple. Real property in lands and buildings is called *corporeal* or *tangible*. Certain other kinds of real property are designated as *incorporeal* or *intangible*. For example, the rights that one landowner may have to use the land of an adjoining owner for access to a highway, for pasture, for hunting, and for many other purposes belong in this class.

(b) *Personal*. Personal property consists primarily, though not exclusively, of movable things. This property is commonly classified as follows: (1) *real chattels*, such as leases for terms of years on land; (2) *personal chattels*—ordinary movable property such as everyone owns—jewelry, clothing, books, and the like; (3) *choses in action*, which include bonds, stocks, claims one may have against debtors, and similar intangible rights; and (4) rights one may hold in patents and copyrights.

Inheritance. Property of deceased persons is inherited in accordance with the law, which differs somewhat in the several states. If the deceased has made a will which meets the requirements of the law, the executor, who is usually named in the will, after payment of the debts of the deceased, proceeds to distribute the property according to the stipulations of the will. If one dies intestate, that is, having made no will or one which is defective in form, the property is distributed to the heirs in accordance with the law and by an administrator appointed by a probate

court. The law relating to wills and inheritance is exceedingly complex, and not infrequently there is prolonged litigation over the division of the decedent's estate. If one dies intestate without heirs, his property "escheats" to the state, the original and ultimate proprietor.

2. TORTS. Any violation of a wide group of individual rights, such as personal security, liberty, property, and reputation, is called a *tort*, and the injured party may maintain suit for damages. No definition of the term is satisfactory; it can be understood only by examples and explanations.

(a) *Against the person.* Certain torts are committed against the person. Arrest without probable cause belongs to this class. A homely illustration of this particular tort is furnished by a landlord who was forced to pay damages to a lodger whose arrest he had caused on a suspicion that she had stolen about half the feathers from a bed in her room.¹⁸ A similar tort is the institution of legal proceedings against one with malice and without probable cause. This must not be construed to mean that any time a defendant wins a judgment he may then collect damages from the unsuccessful plaintiff. The plaintiff must show that the suit was maliciously instituted. Another tort against the person is *assault*, which is an attempt, real or apparent, to do bodily harm. Thus, a threatening shake of a fist under another's nose or a rush toward another with intent to strike him constitutes assault. If bodily contact is made in such cases, another tort, *battery*, is committed. Of a number of other torts which are primarily against the person, we may mention enticing children away and alienating the affections of a wife or husband. *Slander* and *libel* constitute two well-known torts against the person. The former is a defamation of character published orally; the latter is the same published in writing, print, or figure.

(b) *Against property.* Certain torts are primarily connected with property. For example, A, without lawful excuse, interferes with B's attempts to secure contracts; or, A, having knowledge of a contract between B and C, influences C to break the contract. Again, A makes a fraudulent representation to B in a business deal, which B to his damage believes to be a truthful representation. *Trespass* covers a wide variety of torts, such as, the unlawful taking of personal property, forceful damage to such property, and nuisances to land. Indeed, the term is so broad that some of the torts mentioned under other headings, assault and battery, for example, are often classed as trespasses.

(c) *Against person and property.* Manifestly, a number of torts may affect both the person and property. Thus loud noises, noxious odors, and dense fumes which discolor buildings and ruin the housewife's curtains, are nuisances which not only disturb persons in their use and en-

¹⁸ F. L. Simpson, *Cases on Torts* (1908), pp. 297-299.

joyment of property but also lower the value of such property. Similarly, the many torts grouped under the familiar term *negligence*, such as careless or reckless driving, may cause both personal injury and damage to property.

No recovery of damages if injured party is at fault. Although damages may be recovered for a tort, it does not follow that damages will be paid every time one receives an injury. Suppose two negligent drivers have a collision, and one is injured. The injured party's "contributory negligence" bars him from collecting damages. By the same token, an employer is not liable at common law for the injuries of an employee who was negligent. Furthermore, the old common law doctrine of "fellow servant" prevented a workman from recovering damages if his injury was due to the negligence of another employee. The liability of the employer in both these cases, however, has been established by statute in most states, thanks to the efforts of socially minded citizens and labor organizations.¹⁹

3. **CONTRACTS.** The making and enforcing of contracts is an indispensable practice in business. An agreement to sell a piece of property for a specified sum, to pay for value received the principal and a certain rate of interest on a note at a specified time, to carry goods from one point to another for a consideration, to pay a stipulated premium in return for insurance protection, and many similar agreements are contracts. The important contracts must ordinarily be written in order to be enforceable in court. Others may be oral. An individual who has been shown a hat to his liking and walks out of a store with it without saying a word is understood to have made a contract, an implied contract, to take the hat and pay the price for it. For breach of contract one may collect damages at common law, and in certain cases, as already indicated, get an order for "specific performance" in an equity proceeding.²⁰

4. **BUSINESS ORGANIZATIONS:** Another important group of laws has to do with business organizations. Of particular interest are the partnership and the corporation.

(a) *Partnerships.* The partnership represents a relatively old form of business combination, but many small enterprises and some large ones are still carried on under this form. Its advantages are perhaps obvious enough, but it has certain disadvantages. For instance, it is dissolved when one of its members withdraws or dies. Also, the debts of the partnership are the debts of the individual members, which means that a large debt may be saddled upon one solvent member, or perhaps that a too trusting individual may find himself ruined by the knavery of his partner.

(b) *Corporations.* The corporation is the institution through which most large businesses have come to be conducted in the last hundred years. It comes into being through a charter issued by the state to a group of

¹⁹ See Ch. 23, sec. II.

²⁰ See Ch. 5, sec. V, on laws impairing the obligation of contracts.

natural persons. This legal person so created may sue and be sued, buy and sell property, and exercise certain other rights, just as natural persons do. The term of its life is fixed by the charter, not by the death or withdrawal of a member or members. The membership may change, but the corporation goes on. This power of "perpetual succession" is one of the features of the corporation which make it superior to the partnership for business purposes. Another advantage it has over the partnership is that the individuals who hold the stock are liable only to the extent of the par value of that stock, unless it be a special kind of stock, like bank stock. Thus, a man who has \$1000 in the stock of a particular corporation will lose only that amount if the corporation should fail. His other property cannot be seized to pay the debts of the corporation.²¹

5. DOMESTIC RELATIONS: A word must be said about one other large body of private law, the law of domestic relations.

(a) *Marriage and divorce.* Marriage licenses are issued and weddings solemnized in accordance with state law. Persons below a certain age and within a certain degree of kinship are not permitted to marry. Certain types of marriages, for instance, those entered into under fraud or duress, may be annulled. Divorces are granted by the courts under the authority of a legislative act in every state except South Carolina, where the old practice of leaving the granting of divorces entirely to the legislature still prevails. The only ground for divorce in some states is adultery; other states add such grounds as desertion, conviction of crime, and incurable insanity; and some states are very liberal, allowing dissolution of the marriage on such grounds as "mental cruelty" and "incompatibility of temperament." It is notorious that persons who live in states which have strict divorce laws often go to more liberal states to obtain their "freedom." Not infrequently some difficulty arises over the refusal of the state in which the parties actually live to recognize the validity of a divorce which one of them obtained while residing temporarily in another state.²²

(b) *Status of married women.* Some twenty-five hundred years ago, King Ahasuerus laid it down as one of the laws of the Medes and the Persians "that every man should bear rule in his own house." The old common law was somewhat in accord with this rule. By that law, the husband was the guardian and protector of his wife, and it followed more or less logically that her property became his, even her clothing. The wife could make no binding contracts, and her husband could recover damages for any injury done her. On the other hand, the husband was obliged to support his wife and was held liable for any torts she might commit, for the necessities of life furnished her, and for the contracts she

²¹ Only private corporations are discussed here. There are various other corporations, such as municipal corporations, which have governmental or quasi-governmental purposes.

²² See ch. 3, sec. III, under "full faith and credit."

had entered into before marriage. Such, in substance, was the common law on the status of married women, a status which caused women struggling for emancipation to say they were "dead in the law." During the last hundred years this status has been modified materially by liberal judges, and particularly by statutes. In some of the states, wives now enjoy practically the same rights as their husbands; but the forces which contend for absolute equality the nation over still have a few strongholds to take. In general, however, it can safely be said that such inequality of the sexes as remains is due to physiological, psychological, and social causes, rather than to legal discriminations. I think it was Justice Holmes who said that it took more than the Nineteenth Amendment to convince him that there was no difference between men and women.

(c) *Status of children.* In the old days, a child was practically under the absolute control of the male parent, but modern law protects the child in various ways; for instance, in his right to support, and in guarding him against abuse. Children may be taken away from grossly incompetent parents and placed under guardians. The custody of children of divorced parents is left to the courts, subject only to very general statutory provisions. The courts consult the child's welfare, and as between the parents, allow the innocent rather than the guilty to have custody of the child. Occasionally, a child is placed in the custody of some third person. Children of divorced persons are commonly supported from the father's income or estate.

Civil procedure: The brief survey of the rules of substantive civil law must now be followed by a discussion of the rules by which this substantive law is enforced, the rules of civil procedure. A simple illustration will show the difference between substantive and procedural law. A is injured by the negligence of B. His right to damages is covered by substantive law; the method by which he legally recovers damages is a matter of procedure. Common law procedure was formerly used in all the states; but its technicalities were such that justice was often defeated, and, as a result, the states were led to modify the common law procedure by statutes, or by judges acting under the authority of statutes. At present, the system of procedure differs somewhat in the several states, but a general discussion of it will suffice.

1. **PLEADINGS:** In some of the minor courts, the parties to a suit simply go to court and tell their story and the justice decides the case. This method has not been found satisfactory in the regular trial courts; consequently, they continue to use a rather formal system of pleadings.

(a) *Preliminaries.* The plaintiff goes to an attorney and tells his story, and the attorney directs the clerk of the court which has jurisdiction to issue a writ of summons. This writ summons the defendant to appear in court at a specified time to answer the plaintiff. It is given to the sheriff, whose duty it is to find the defendant or his attorney and serve the writ.

Ordinarily, the action cannot proceed until actual service has been made; but in certain cases, for example, divorce actions, where the defendant is outside the jurisdiction or residing in parts unknown, publication in newspapers is deemed sufficient. If the defendant has not already engaged a lawyer, he should do so at once; for failure to enter appearance in connection with the suit will mean that judgment will be entered against him by default. The attorney "files an appearance" for his client with the clerk of the court. He then notifies the attorney for the plaintiff that the appearance has been filed, and the two attorneys thereafter notify each other of all the subsequent steps taken in the case.

(b) *The declaration and answer.* The next move is for the plaintiff to file a declaration (sometimes called a "complaint" or "petition"), setting forth his cause of action. It must be very carefully drawn; for it must show a cause of action sufficient in law to warrant a judgment for the plaintiff. This declaration is filed with the clerk of the court, and a copy of it is served on the defendant, together with a notice that he shall file an answer to the declaration within a certain date. The defendant, acting through his attorney, of course, may file a demurrer; that is, he may admit the facts as set forth by the plaintiff, but deny their legal sufficiency. In common parlance a demurrer is, "Yes; but what of it?" This passes the question of the sufficiency of the declaration to the judge. If he adjudges it legally sufficient, he "overrules" the demurrer and the plaintiff wins his case, unless the court, as it generally does, allows the defendant to file an answer to the declaration. If the demurrer is sustained, the defendant wins this point and would have judgment in his favor but for the fact that the court then generally permits the plaintiff to remedy his declaration by amendment. Assume, now, that the defendant answers the declaration of the opposing party. This answer or plea may admit certain allegations of the plaintiff and deny others. The points on which the declaration and answer differ are the points which will be in issue at the trial. The nature of the defendant's answer may be such as to warrant a response by the plaintiff, and in a number of states this replication (or reply) is permitted in order that all the points at issue may be brought out clearly. It often happens that the defendant's answer does not constitute a sufficient defense. It is now the plaintiff's privilege to demur, which he does by asking the court to enter judgment for him "for want of a sufficient answer" from the defendant.

Settlement out of court. Assuming that the parties have "agreed to disagree" on certain points as shown in the declaration and answer, the case must be prepared for trial. The lawyers on both sides interview (the cynic might say "coach") their clients and witnesses, and make every legitimate effort to forge chains of evidence which cannot be broken. As the day of the trial draws near, both sides may feel somewhat uncertain and they may reach a settlement out of court, much to the relief of all parties.

Occasionally, the judge suggests such a settlement when the case is called, with good effect. Experienced observers think that judges could frequently bring about such settlements if they were more inclined to extend their good offices in this way.

2. **THE JURY.** If no settlement is made, the case comes up for trial in due time. The judge presides over the court and passes on points of law, while a jury is usually called to decide the questions of fact. If both sides agree, the jury may be dispensed with, and the case is tried before the judge alone. Let us follow the steps of a case which is tried by jury. A number of citizens have been previously summoned for jury service, and when a particular case is to be tried, twelve persons (a smaller number in some states) are selected for this case. Counsel for either party may challenge any juror for cause; that is, on the ground that he is mentally defective, has business connections with the other party, is prejudiced, or on similar grounds. The judge will excuse such jurors as are shown to be unfitted for the service. Each party is also allowed several peremptory challenges, challenges for which no causes are assigned but which are made on the basis of "intelligent hunches" as to what jurors are likely to be unfavorable to the party's case. Citizens ordinarily have an aversion to jury service, and they are often excused for rather flimsy reasons. Yet the average person will learn a great deal on a jury that he would never learn otherwise, and certainly a good citizen should be willing to make a temporary sacrifice for the good of society.

3. **THE TRIAL.** The jury having been secured and sworn, the judge orders the attorneys to proceed with the case; whereupon the counsel for the plaintiff rises and makes the opening statement. He informs the court and the jury of the facts in the plaintiff's case, of the nature of the evidence he will offer to prove these facts, and of the damages he asks for his client. He does his best to create a favorable impression for his client with the jury. His case may be won or lost by this initial effort. In some courts, this statement is immediately followed by the opening statement of the defendant's attorney; but in others, this may be delayed until the evidence for the plaintiff has been offered. In any case, the opening statement for the defendant has the same general purpose as that delivered for the plaintiff.

Examination of witnesses. The attorney for the plaintiff now proceeds to examine his witnesses, probably beginning with the plaintiff himself. He must be careful not to ask a witness a "leading question"; that is, a question which suggests to the witness the answer the attorney desires. Also, he must guard against asking questions which are not relevant to the issue; for instance, questions relating to the number of the defendant's dependent children, if the matter in controversy is the amount of damages to be allowed for a personal injury. When the plaintiff's lawyer has examined the witnesses for his side, the attorney for the defendant may then

cross-examine them. His purpose is, of course, to expose the weak spots in their testimony and discredit them with the jury. This often makes a good "show" in court; but if the attorney is not considerate in his treatment of witnesses, he is likely to turn the jury against his client's case. Witnesses for the defendant are examined and cross-examined in similar fashion. During the examination of witnesses, one attorney may "object" to questions asked by the other, and the judge overrules or sustains the objection. In either case, one of the lawyers is ruled against and he may "take an exception" to the judge's ruling. These exceptions often constitute grounds for appealing the case.

4. **THE VERDICT.** If the evidence submitted indicates that one side or the other has failed to make out a case, the judge may, on motion of the attorney who considers his client entitled to the verdict, direct the jury to bring in a verdict for the defendant, or the plaintiff, as the case may be. It is probable, however, that the judge will decide that sufficient evidence has been offered on each side to warrant the deliberation of the jury. If so, he directs the attorneys to "go to the jury." Each lawyer then makes an argument summarizing the points on which he rests his client's case. Following these, the judge delivers the "charge to the jury." In a number of the Western states, the judge's charge precedes the arguments of the attorneys. This procedure has been criticized because it tends to leave the minds of the jurors on the eloquence of counsel rather than on the principles of law applicable to the case. The charge to the jury is often a rather long discourse. The judge explains the law applicable in the case, emphasizing that the jury must take his word for the law; that the jury is to decide the facts. He helps the jurors with this duty by reviewing the evidence offered and by giving them a great deal of good advice as to how evidence should be weighed, cautioning them at the same time that in reaching a verdict they must be governed by their own recollections of the evidence.

The jury then retires, somewhat bewildered, perhaps, by all the judge has told them, but having, in the ordinary case, a pretty good idea as to which party is entitled to a favorable verdict. The jurors deliberate, and usually compromise before reaching an agreement. The compromise is frequently necessary because twelve persons seldom see things alike and the majority of the states require a unanimous verdict. The jury may decide for the plaintiff or for the defendant; occasionally it is unable to effect a compromise, and disagrees. If it decides for the plaintiff, it must also fix the damages (the amount being another matter for compromise). In the event the jury disagrees, the case must be tried again with a new jury.

5. **APPEALS.** Sometimes both parties are disappointed in the verdict; usually one of them is, and he and his attorney may attempt to get a new trial. The argument for a new trial rests upon various grounds, such as

judicial error in a ruling concerning the admissibility of evidence or in instructions to the jury, or a verdict contrary to the evidence. This argument will be heard by the judge who presided at the trial. If the judge refuses to grant a new trial, the losing party's next move in the fight is to take an appeal. Frequently there is no right of appeal in certain types of cases, such as those involving small amounts; but important cases, such as those in which the amounts in controversy are considerable or in which constitutional questions are involved, may be appealed as a matter of right. Generally, in an appellate court, only points of law are at issue and there is no jury. Lawyers prepare their "briefs" and shape their arguments to convince the judges, reserving their oratorical and emotional efforts for the trial courts in which the jury is employed. The appellate court may sustain the judgment of the lower court, or it may point out certain errors in that court's proceedings and direct the court to hold a new trial. In a few cases, those requiring a construction of the Constitution of the United States being most common, appeal may be had from the highest state court to the Supreme Court at Washington. Trial, appeals, new trials, and perhaps more appeals, require a great deal of time. Sometimes a controversy may be in the courts for several years, or even a decade.²³

Executing a judgment. Assume that in the course of time a plaintiff gets a judgment against a defendant. The defendant may be "judgment-proof," having no property with which to satisfy the judgment. In Dickens's day he was not "jail-proof," however, his creditor being permitted to cause him to languish in confinement until he paid or until the creditor was convinced that he could not pay. Imprisonment for debt is now abolished;²⁴ but, for obvious reasons, it was never a satisfactory method of collecting a debt from an insolvent debtor. Ordinarily the defendant has the means to satisfy the judgment, since the plaintiff and his attorney usually do not take the trouble to start suit against one who is insolvent. If the defendant should refuse to pay the damages allowed, the plaintiff's lawyer will get an order from the court directing the sheriff to sell certain properties of the defendant and to pay the plaintiff the amount of the judgment out of the proceeds.

Equity proceedings. The procedure as outlined above is that generally followed in suits at common law. A brief discussion must now be devoted to proceedings in equity cases. The plaintiff files a "bill," stating his complaint and asking the court for relief. The defendant may demur, as in suits at common law, or he may answer the bill. The case goes to court on the points at issue shown by the bill and answer. A noteworthy feature of equity procedure is that a jury is seldom used. Occasionally a judge

²³ See S. E. Baldwin, *The American Judiciary* (1905), Ch. XXIV.

²⁴ Individuals may still be imprisoned, however, for certain kinds of debts; for example, those involving fraud or willful disobedience of a court order.

will direct that certain questions of fact be referred to a jury, although the verdict is advisory only, serving somewhat as a guide to the judicial conscience. A few states have granted by statute the right of jury trial in equity cases, and in such states the judge is bound by the jury findings in equity cases as in cases at common law.²⁵

Equity courts move more quickly than common law courts. It often happens that no oral testimony is introduced, the bill, the answer, perhaps a replication, and depositions of witnesses being held sufficient. Not infrequently the judge will refer a complicated case to an examiner or master in chancery, who will investigate the case and make a report to the court. The court then makes its decree on the basis of this report although it is not bound to accept the findings of the examiner or master. As just indicated, equity courts give their decision in the form of decrees. The defendant may be ordered to execute a contract, cancel a mortgage, or to do or not to do various things. Failure to comply with the decree constitutes contempt of court and is punishable by fine or imprisonment.

Declaratory judgments. It is understood that the common law provides remedies only after damage has been done, and that equity is often used to prevent an impending injury. But even equity stops short of the need in some cases. Parties often want to know, without the necessity of instituting ordinary suit, their rights under certain provisions of a will, a contract, or other instrument. Of course, one may consult a lawyer; but, valuable as his legal advice may be, it is often felt that something more in the nature of a judicial opinion is desirable. This is now provided for in a large majority of the states through the device known as the "declaratory judgment."²⁶ A party having an interest in such an instrument as mentioned above institutes the proceeding; the court then calls in the other party or parties and gives the declaratory judgment, thus settling the issue without giving a judgment for coercive relief. Declaratory judgment procedure received a decided impetus in 1933, when the Supreme Court of the United States held that it could review any such judgment of a state court if the facts of the case were such as to constitute a "case or controversy" between the parties, thus bringing the case within the range of federal judicial authority.²⁷

Conciliation and arbitration. Still less formal and less expensive than the declaratory judgment procedure, conciliation and arbitration have significant places in the administration of civil justice. Under conciliation procedure, a duly authorized person, usually a court official, attempts to find a solution for an issue between two parties. He talks the matter

²⁵ In several states the courts have declared this statutory requirement invalid.

²⁶ Declaratory judgments must not be confused with advisory opinions, which are given in only a few states and only to executives and legislatures on such questions as the constitutionality of proposed legislation.

²⁷ *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249 (1933). The next year Congress passed the Federal Declaratory Judgment Act.

over with them, kindly explaining the law and giving his opinion on its application in this case. He may mention the great expense of going through regular court procedure, and the case may be such as to prompt him to suggest that such a proceeding would be folly. The conciliator has no authority to bind the parties to the dispute, but tactful men, full of mellow wisdom, often suggest solutions which are mutually satisfactory to the disputants. Since 1913 the city of Cleveland has made extensive use of conciliation procedure, and New York City and several other cities have developed the practice. More than twenty years ago, North Dakota adopted a state-wide conciliation plan.

Almost all of the states have enacted some type of arbitration law, although only a few of the states measure up to the fairly adequate standards set by California, Massachusetts, New York, and one or two other states. The conciliation system works about as follows: Parties to a dispute, let us say over the fair value of services rendered, select an arbitrator, and, of equal importance, agree to abide by his decision. After appropriate hearings and deliberation, the arbitrator makes his decision, a decision that may be enforced as if it were a regular court judgment. An appeal lies to a court to determine whether the procedure was in accordance with law, but not as to the facts found by the arbitrator. This is the way the system operates in the states which have effective arbitration laws. In other states—in most of them, in fact—individuals may not be compelled to arbitrate, even though they agreed to do so in advance of any dispute, and appeals are permitted on both law and facts. Arbitration has unquestionably demonstrated its feasibility. It only remains for legislatures in most of the states to rid themselves of the old idea that all cases should proceed, or should be allowed to proceed, to the stage of formal controversies, to be settled in the regular courts, where there are attorneys to argue, judges to rule and advise, and juries to deliberate. Perhaps we prefer to have our justice highly flavored with drama and cloaked in formality; or it may be that we are suspicious of an award which does not cost us a good round sum.²⁸

V. CRIMINAL LAW AND PROCEDURE ²⁹

Crimes. A crime is an act committed in violation of law and punishable by the state. There are major offenses, or felonies, and minor offenses, or misdemeanors.

FELONIES. The more common felonies are here defined. (1) *Treason* consists of levying war against a state or adhering to or aiding its enemies. (2) *Murder* is the intentional killing of a human being by another. A

²⁸ Dodd, *op. cit.*, 341-343; A. F. Macdonald, *American State Government and Administration* (1940 ed.), pp. 245-246; Emily Holt, "Justice Without Juries," *Harper's*, December, 1931, pp. 92-102.

²⁹ See references for preceding section.

number of states distinguish between degrees of murder, deliberate and premeditated murder or murder which grows out of an attempt to commit another felony, such as burglary or robbery, being called "first degree"; and other types of murder, "second degree." (3) *Manslaughter* is the unintentional killing of another. This is also commonly divided into two or more degrees. Taking another's life, even with intent, is usually classed as manslaughter rather than murder, if done under mitigating circumstances. Indeed, one occasionally reads of a murder committed under such provocation that no indictment of any kind is made. (4) *Arson* is the burning or partial burning of a building of another. If a person should be burned to death in the building, the crime becomes murder. (5) *Burglary* consists of breaking into a building with the intention of committing therein a felony. Stealing the family silver and jewelry is only one of a number of felonies which a burglar might intend to commit, although it is the most common. (6) The unlawful taking of the property of another by force or threat of force is *robbery*. (7) Taking property in sneak-thief and pickpocket fashion is *larceny*, a very common crime. Stealing of personal property of considerable value is invariably a felony and it is often called "grand larceny," while small thefts are rated as misdemeanors and are known as "petty larcenies." A number of other crimes, such as forgery, embezzlement, taking property under false pretenses, kidnapping, and perjury, are classed as felonies in a number of states. The question as to whether a particular crime is a felony or misdemeanor is determined by the law of the state in which the act was committed.

MISDEMEANORS. The typical justice of the peace and police court cases, punishable by small fines and short jail sentences, are classed as misdemeanors. Defacing public property, illegal driving and parking, the use of profane or blasphemous language, the exhibiting of indecent pictures, the keeping of disorderly establishments, and the maintenance of various other nuisances, go in this class. A man who makes a great noise at night with a speaking trumpet, to the disturbance of the neighborhood, may find himself in the police court for creating such a nuisance. A woman who had the habit of scolding on all occasions in such a manner as to constitute a common nuisance was convicted some years ago in New Jersey.³⁰ But a devout worshiper in North Carolina, whose voice was heard at the end of each verse of a hymn after the congregation had ceased and whose peculiarity in this manner excited mirth in one portion of the congregation and indignation in the other, while held to be a proper subject for discipline in his church, was discharged by the court as being innocent of any public offense.³¹ A number of offenses which were mentioned under torts may also be misdemeanors. Thus, assault and

³⁰ *Baker v. State*, 53 N.J. Law 45 (1890).

³¹ *State v. Linkhaw*, 69 N.C. 214 (1873).

battery may give rise to civil action on the part of an injured person and at the same time be of such a nature as to constitute offenses against the public. The same may be said of libel and slander and some other wrongful acts.

WHAT CONSTITUTES A CRIME. Intent is the basic element in many crimes. Breaking and entering a house with the intention of committing a felony therein constitutes burglary, whether the felony be actually committed or not. A person seen thrusting his hand into the pocket of another and withdrawing it without the coveted wallet or watch may be convicted of an attempt to commit larceny. But one who takes property unlawfully under a *bona fide* claim of right is not guilty of larceny. Young children and insane persons cannot commit crimes in the technical sense, for they are irresponsible; intent cannot be shown. Drunkenness, however, is no excuse, though in some instances it may reduce the degree of the crime. A person who assists a felon is, of course, guilty of a crime also. He is designated as an "accessory before the fact," if, being absent at the time the crime was committed, he procures, counsels, or commands another to commit it; and he is an "accessory after the fact," if, knowing a felony to have been committed, he receives, relieves, or otherwise assists the felon. For treason and all offenses below the degree of felony there can be no accessories, all who would be classed as such in other crimes being treated as principals. In some jurisdictions there is no important distinction in any crime between an accessory before the fact and a principal, both being subject to the same penalty.

Criminal procedure. The public is much more interested in the trial of criminal cases than in the law respecting various crimes. This interest is not entirely misplaced, since the apprehension and prosecution of criminals is a matter of fundamental importance to society.³²

WARRANTS AND ARRESTS. When a crime has been committed, the first thing, of course, is to arrest the guilty or suspected persons. Arrests may be made with or without a warrant, according to circumstances. In general, it may be said that if one is seen in the act of committing a crime, or, if there is reasonable ground for belief that an individual has committed a felony, an arrest may be made without a warrant. In other cases a warrant must be had. It is usually issued when some person makes a sworn charge that a crime has been committed by another at a particular time and place. It should be stated here that the person making the charge must have reasonable grounds for it; otherwise the individual against whom complaint is lodged may sue him for causing his false arrest. When the complaint is duly made, a magistrate issues the warrant directing the apprehension of the individual named. Naturally, arrests are commonly

³² See National Commission on Law Observance and Enforcement, *Report* (No. 8) on *Criminal Procedure*.

made by officers; but individuals may make them also, acting upon their own initiative when they have witnessed a crime, or assisting an officer whenever called upon to do so.

SUMMARY TRIALS. If one is accused of a minor offense, of such a misdemeanor as exceeding the speed limit, parking in a prohibited area, or committing an ordinary nuisance, the trial is conducted by a magistrate or justice of the peace. This officer hears the case and decides questions of both law and fact, trial without jury in such cases not being held to violate the constitutional guaranty of trial by jury. The accused may have counsel, if he desires it, and he may stand on his right to refuse to testify. The magistrate is commonly empowered to impose a small fine or a short jail sentence upon minor offenders. Appeals are allowed from the magistrate's court; but one convicted in such a court usually feels that there is more to be risked than gained by an appeal.

Procedure in felony cases: 1. **PRELIMINARY HEARINGS.** When an arrest is made for a major offense, the individual is brought before a magistrate for a preliminary hearing. The magistrate does not conduct the trial; but rather, decides whether, considering the evidence against the accused, there are sufficient grounds to hold him for trial. The magistrate does not ordinarily hear evidence on both sides but hears only evidence against the accused. However, the accused must be allowed to testify on his own behalf, if he cares to do so. If the evidence indicates probable guilt, the magistrate will hold the accused for the action of a grand jury or prosecuting attorney. In the meantime, the accused may be released on bail, a right which the constitutions guarantee except for capital offenses. Furthermore, if he feels that he is being held in jail on insufficient grounds, or that he is forced to stay in jail because he cannot raise what he regards as an excessive bail, he may apply to a court for a writ of *habeas corpus*. He will then be brought into court, and a judge will determine the legality of his restraint. This may result, of course, in his release, or in his being returned to jail to await further proceedings in his case.

2. **INDICTMENT.** On the basis of the magistrate's report of the preliminary hearing and from what other information the prosecuting attorney can gather, that officer prepares an indictment and presents it to a grand jury. This body, carried over from English practice, was formerly used in all states for securing indictments, and it is still used in many of them. At common law it was composed of from 12 to 24 members, though in some states a smaller number is now provided. It considers the evidence presented by the prosecuting attorney, collects evidence for itself, if so minded, and by majority vote decides what persons shall be held for trial. If it votes to hold a particular individual for trial, the foreman endorses "true bill" on the indictment. If a majority is convinced that a trial should not be held, the indictment is marked "*ignoramus*" (we ignore). The grand jury not only passes upon cases presented to it by the prosecut-

ing officer, but it may direct him to prepare other indictments on the basis of evidence it uncovers.

Indictment by grand jury is often spoken of as a slow and cumbersome method of bringing an accused to trial. Some states no longer require it, and some others require it only for certain types of cases. In such states, indictment is by an "information" prepared by the district attorney and filed with the court having jurisdiction to try the case. Great care must always be taken in preparing an indictment. The offender and his victim must be named; the time, place, and character of the offense must be detailed; and it must be shown that the offense was contrary to law.³³ A defective indictment often results in the discharge of an accused on a "motion to quash."³⁴

3. **ARRAIGNMENT.** After the indictment, in due course the accused is arraigned; that is, he is brought to the bar of the court to answer the accusation, a copy of which has been furnished him. An officer of the court asks the accused to rise, states the charges, and then puts the question, "How say you, guilty or not guilty?" If the accused pleads "guilty," there is then no issue between him and the state, and the judge pronounces the sentence, although before doing so he may hear testimony and argument which may throw more light upon the case, thus aiding him in fixing a just sentence. The plea of "guilty" is often made when the defendant thinks he is quite likely to be convicted. Such a plea saves time and expense for the state, and usually results in a lighter sentence than the defendant would receive if found guilty by a jury. Not infrequently one reads of a defendant's changing his original plea of "not guilty" to "guilty." Occasionally, usually upon advice of counsel, a defendant changes his plea of "guilty" to "not guilty."

4. **THE TRIAL.** If the defendant pleads "not guilty" or refuses to plead at all (which is commonly treated as a plea of "not guilty"), he must then be tried by a jury. In a few states he may waive jury trial, but in most states he has no option in this matter. The general rule is that the jury shall consist of twelve persons, although several states prescribe a smaller number for other than capital offenses. The jury is selected as in civil cases, the only differences being that a greater number of peremptory challenges are permitted and that great latitude is allowed in challenges for cause. The prejudices, the opinions, the knowledge, the associations, and what not, of each prospective juror are anxiously inquired into by counsel. It frequently happens that practically all intelligent persons in a community have knowledge of and an opinion concerning an important case which is brought to trial, the result being that they are disqualified as jurors and the box is filled with persons of a very low degree of intelli-

³³ See Callender, *op. cit.*, pp. 177-178, for a typical indictment.

³⁴ Occasionally, a purely technical defect will spoil an indictment, as in West Virginia when "W. Virginia" was held insufficient to designate that state. 4 W. Va. 755 (1870).

gence. It is often suggested that intelligent persons who would take an oath to return a verdict in accordance with the evidence presented at the trial would be much more likely to arrive at a correct decision than persons of low mentality who know nothing of a case previous to the trial; but the legal minds are not impressed with the weight of this suggestion.

The rights of persons on trial for crime have already been discussed in the chapter on "Civil Rights." Here only a few matters of court procedure need be noted. The prosecuting attorney opens the case for the state with a speech to the jury, outlining the charges against the defendant and the nature of the evidence he will offer to prove them. It is not the duty of this officer to secure a conviction of the accused unless he is guilty. It is his duty to see that justice is done. But, inasmuch as the prosecutor is judged by the number of conviction scalps he wears on his belt, he sometimes becomes overzealous in his efforts. After his opening speech, he examines his witnesses. These may be, and usually are, examined by counsel for the defendant. When the state's case has been thus presented, the defendant's counsel then makes his speech to the jury, examines his witnesses, and turns them over to the prosecutor for cross examination. Each attorney, as in civil cases, objects to certain questions asked of witnesses by the other and takes exceptions to unfavorable judicial rulings. The testimony concluded, the prosecutor attempts to show the jury that the accused stands convicted; and the defendant's attorney follows him in what is usually a still greater effort to show that the state has failed to prove the guilt of his client.

The attorneys are supposed to confine their addresses to the evidence in the case; but this rule is very liberally interpreted and it would seem that it is practically ignored in some cases, despite the fact that the better element in the legal profession insists upon its observance. To save the accused from the penitentiary or from death, counsel may paint for the jury a picture of a broken-hearted wife and mother and of children much worse than orphaned; and he may speak at length upon many similar points which have no bearing upon the question to be decided, namely, the guilt or innocence of the accused. While prosecutors are not quite so likely to go to such lengths, there are a few cases in which their emotional appeals rival those of the defense counsel. In a famous murder case in North Carolina, a prosecutor shouted at the jury that a certain labor union headquarters was "a whole section of hell! There was immorality there. Yes, *immorality!* Hugging and kissing in public. I'm old-fashioned. I'm a Sunday school man." He said that he was defending his community where "the dove of peace hovers around the vine-clad door and the kindly light of an autumn sun kisses the curly hair of happy children." He spoke of union organizers as "fiends incarnate, stript of their hoofs and horns . . . from the wild plains of Soviet Russia." He knelt before the jury, holding the hand of the slain man's widow. In conclu-

sion, he recited a poem to Mother, and, to show the breadth of his charity, shook hands with a communist.³⁵

Following the closing speeches of the attorneys, the judge "charges" the jury. In this charge he informs them of the legal aspects of the case and tells them how to weigh the evidence which has been offered. The laws of most states prohibit the judge from commenting upon the evidence in such a way as to let the jury know his opinion concerning the guilt or innocence of the accused. The judge tells the jury that the accused is innocent unless the state has beyond a reasonable doubt proved him guilty. On the other hand, he cautions them that it is not necessary for the state to prove guilt beyond the possibility of a doubt. With these instructions, which in important cases often cover many pages, the jury retires to consider the verdict. Unanimity is almost invariably required for a decision in major offenses. Sometimes the verdict is quickly reached; but cases which make the newspaper headlines often hold the jury for hours, or even days. Sometimes it is impossible to reach any decision, in which case the jury is said to be "hung." For the less serious crimes, a number of states have modified the jury trial to the extent of requiring only a three-fourths or five-sixths majority for a verdict. If a verdict of guilty is rendered and if the court overrules the frequently made motions in arrest of judgment and for a new trial, the judge pronounces the sentence. Before doing so, he may hear a plea for clemency from the attorney of the individual who stands convicted. If the unhappy man has a good record previous to the offense for which he is found guilty, the plea will probably not be in vain. The statutes commonly fix the maximum and minimum penalties, leaving the exact penalty for individual offenders to be determined by the judge, a discretion which a wise judge often applies on the side of clemency for persons who have fallen from grace but who are not past redemption.³⁶ The sentence ends the work of the trial court; but on various grounds a subject of its adverse judgment may appeal to the higher state courts.³⁷

Punishment for crime. Formerly, capital punishment was administered for a great variety of crimes. As late as the reign of George III there were about two hundred offenses punishable by death; among these offenses were cutting down a tree and stealing goods in a shop to the amount of five shillings. The same penalty was exacted for a number of crimes in the American colonies; but the number has steadily decreased, until now only five or six states have the death penalty for as many as four crimes,

³⁵ National Commission on Law Observance and Enforcement, *Report* (No. 11) on *Lawlessness in Law Enforcement*, pp. 319-320, and *Time*, October 28, 1929, p. 13.

³⁶ In a number of states the judge now imposes a maximum penitentiary sentence and an administrative board later fixes the exact time to be served.

³⁷ Appeal may be taken from the state supreme court to the Supreme Court of the United States only when a right under the Federal Constitution has been denied; for example, when "due process," a guaranty of the Fourteenth Amendment, is violated.

and in the majority of the states murder alone may carry that penalty. A number of states have abolished the death penalty altogether. Other punishments range from life imprisonment to short jail sentences and small fines, varying with the nature of the offense, the character of the offender, and, to some extent, according to the laws of the different states. The criticism is often made that punishment as administered does not reform the criminal. Nearly every prison is crowded. The warden is by force of circumstances a custodian, who must operate the prison within his budget, rather than a reformer. Considering these facts, it would be surprising if a majority of the prisoners were reformed, although some of them undoubtedly are. Then, too, the trouble is not all within the prison walls. Prosecuting attorneys, who are often bent only on securing the severest penalty; judges, who sometimes lack human understanding or who are held to a rigid formula by statute; juries, who are not infrequently swayed by prejudice and emotion; and respectable citizens, who sometimes show an unwillingness to give an ex-convict a new start in life, must all bear a share of the blame.³⁸

AMELIORATION OF PUNISHMENT. Punishments may be reduced in various ways. The most sweeping method is by the executive pardon, which, if unconditional, wipes away all legal consequences of the crime. In many jurisdictions a person convicted of a minor crime may be placed on probation, and if he maintains a proper standard of behavior, he will not be forced to serve a single day in prison. Nearly all of the states now have a parole system, a system under which an individual who has served a part of his sentence and who has been a good prisoner may be released from prison. Such a person remains under the supervision of public authorities, however, and he may also receive assistance from them in obtaining employment and in "going straight." The effective administration of the parole system is seriously impaired in a number of the states because too few parole officers are employed. The success of a parole system depends largely upon the work of these officers, a fact which governors and legislatures are slow to realize.

VI. "JUSTICE AND THE POOR" ³⁹

It is impossible to deal in this work with the whole field of judicial administration; but there are two other problems which must be briefly considered. These are: (1) "justice and the poor"; and (2) a few defects of legal procedure.

The theory and the fact. Equality of justice is accepted as a funda-

³⁸ See Warden Lewis E. Lawes, "Why Our Prisons Fail," *New York Times*, Magazine Section, August 16, 1931; J. F. Fishman and V. T. Perlman, "Some Delusions About Crime," *Harper's*, June, 1933, pp. 36-45.

³⁹ R. H. Smith, "Justice and the Poor," *Bulletin of the Carnegie Foundation for the Advancement of Teaching* (1919), no. XIII.

mental principle in America, and it is true that in general the substantive law confers no favors upon particular classes; but the principle of equality often vanishes when individuals must fight for the rights accorded them by law. Inability to pay court costs and fees and to buy the services of attorneys often separates the rich and the poor by a great gulf. Writing in 1919, R. H. Smith estimated that there were 35,000,000 persons in the United States unable to pay any appreciable amount for legal advice and assistance.⁴⁰ The loss of homes, savings, and wages for lack of adequate counsel in civil cases is tragic enough, but the position of the unfortunates who are accused of violating a criminal law is still more pitiable. Publicist Raymond Moley speaks of the great majority of the half million annually arraigned in the criminal courts of New York City as a helpless lot, constituting "not a problem of law enforcement as much as one of social welfare. They are, in large part, merely careless, defective, or unfortunate beggars, vagrants, degenerates, crap shooters, peddlers without licenses . . . sneak thieves, 'dopes' and small-time cheats. . . . All are bewildered, frightened, blindly seeking relief from their difficulties."⁴¹

And this is not the whole story. The poor man's justice may cost him more than the rich man pays for his. Competent investigators made a survey of the cost of civil litigation in New York for the year 1930. It was found that the inhabitants of the City of New York paid through public revenues an average of eight cents each (not including lawyers' fees) for justice in the Municipal Court, the civil court which settles finally the vast majority of the poor man's cases. On the other hand, the inhabitants paid an average of fifty cents each in public revenues for justice in the higher courts, the courts to which men of large affairs go for civil justice. As a result, litigants in the Municipal Court paid 71.1 per cent of the cost of administering justice in that court while those who used the higher courts in New York City paid only about 10 per cent of the cost. It is thus apparent that in New York City, at least, those who can least afford to pay for justice are required to pay about seven times as much as those who can most easily afford to pay.⁴² Another major item in the cost of litigation is counsel fees, an item so large that people of small means are often prevented from going to court, and down-and-outs who are brought to court on criminal charges commonly have grossly inadequate counsel.

Steps in the right direction. Efforts are being made, however, to assist the "forgotten man" in obtaining justice. Kansas (1923) authorized cities and counties to set up small claims courts with authority to decide cases

⁴⁰ *Ibid.*, p. 33.

⁴¹ Quoted from "Justice for the Poor: A Task for New York," *New York Times*, May 3, 1931, sec. 9, p. 1, by permission of the author and the *New York Times*. Acknowledgment is also made to the Yale University Press, since it has published Professor Moley's *Tribunes of the People* in which the statement above is reproduced practically unchanged.

⁴² Summary in Graves *op. cit.*, pp. 659-660.

in which the amount involved does not exceed twenty dollars. Massachusetts, California, and three or four other states have similar systems, and so do several of the larger cities, including Chicago, Philadelphia, and Cleveland. These courts proceed with a minimum of formality, discourage the participation of lawyers, hold costs to a very low figure, and narrowly restrict the right of appeal.⁴³

Legal aid societies, both private and public, now flourish in eighty or more cities. A workman has a claim for a few dollars in wages; a hand laundress is not paid because it is claimed that a shirt has not been returned; a divorced husband is not paying the ten dollars a week alimony ordered by the court, and his whereabouts is unknown; an injured laborer is in difficulties over collecting compensation due him; and a woman who rents one of her two plainly furnished rooms to a waitress has been arrested on her lodger's complaint that the landlady has stolen her clothes. Legal aid societies render assistance in such cases as these, and the best ones pride themselves upon serving their clients as efficiently as would a firm of private attorneys. The cases of those who come seeking help are usually trivial and petty; yes, as trivial and petty as an empty stomach or weeks in jail! The equal protection of the laws is without meaning if it does not give the laundress her wages as it awards damages to a millionaire who was injured in an accident through the fault of a billion-dollar corporation.

The Office of Friend of the Court is authorized by law for every county in the State of Michigan. The Office enforces alimony decrees for the benefit of minor children, gives service in matters relating to land contracts and mortgage foreclosures, and co-operates with the juvenile courts and other social agencies in their work of rehabilitation.⁴⁴

Luckless individuals without a "ten spot" in their possession who find themselves indicted for crime have, in most jurisdictions, been assigned a lawyer by the court. Such lawyers are usually young men without experience or older men who have not succeeded in practice—in either case men who are no match for the public prosecutor, and certainly not to be compared with the good criminal lawyer whom the accused with modest means can afford. Now it is the obligation of the state to convict the guilty and release the innocent. It is therefore no less essential that the accused have counsel for his defense as energetic, as resourceful, and as effective as the state's attorney. In order to accomplish this socially desirable purpose a number of cities and counties have established the office of public defender. These include Los Angeles County, San Francisco, Cook County (Chicago), Minneapolis, and others. Connecticut and several other states have authorized state-wide systems. The defender is an

⁴³ Macdonald, *op. cit.*, pp. 229-230.

⁴⁴ Graves, *op. cit.*, pp. 660 ff., John S. Bradway, *Legal Aid Bureaus* (1935); F. E. Cooper and J. P. Dawson, "The Office of the Friend of the Court in Wayne County, Michigan," *Annual Report of the Judicial Council of Michigan* (1935).

officer of the state enjoying the same status in court as the prosecutor; but his duty is, as his title suggests, to defend the accused. In a number of jurisdictions he defends all of the accused. Such of those persons as are able to do so, pay the state a reasonable sum. In no case do they pay the defender. He is paid by the state at the end of each term of the court. Los Angeles has a slightly different public defender system. The salaried defender and his staff represent only those persons who are unable to pay for their defense (about fifty per cent of those who are brought to court). The success of this system, according to Moley,⁴⁵ is demonstrated by the fact that defendants regularly prefer the public defenders to the lawyers engaged in the criminal practice. It is very doubtful whether any plans will or can be devised which will place the rich and the poor on the same footing in court; but the movements along the lines just indicated will place the poor in a more favorable position for gaining their rights.

Minorities and justice. Another thought that plagues us is that minorities, unpopular minorities, even if they have some money for attorneys' fees, may have difficulty in getting "equal justice." It is not easy to maintain that a Negro who in intelligence and economic status compares favorably with a white man can with equal ease secure his legal rights in all of the courts of the land. He is certain to be under the necessity of winning a favorable verdict from a white jury, and the juries before which his case is commonly tried are quite likely to be prejudiced against him because of his race. Does a labor agitator on trial for murder have only the task of defending himself from that charge; or is he also under the handicap of having to overcome a prejudice the prosecutor, or the judge, or the jury may have against him because he is an agitator? A "radical" is on trial for robbery. Will the fact that he is a "radical" make it more or less difficult to convict him? Here is a despised religious minority, receiving the sort of contempt and scorn that was heaped upon another religious minority, the early Christians. Will the members of this sect who violate local ordinances be caught and arrested by the police with more zeal than they employ in dealing with the general body of inhabitants; and will local magistrates deal as leniently with them as they do with the general body of citizens who violate ordinances? Democracy is an ideal, and equal justice for all is a part of that ideal. The complete attainment of the ideal is not possible, but a constant striving toward it is the standing obligation of a democratic society.

VII. SOME PROBLEMS OF LEGAL PROCEDURE ⁴⁶

The system of judicial administration is often criticized by laymen, lawyers, and judges. It is criticized, not only by idealists, who take as

⁴⁵ *Op. cit.*

⁴⁶ Callender, *op. cit.*, Ch. XV; "A Program for Legal Reform in the United States," *The Consensus*, Vol. XVI, No. 3, October, 1931, and Vol. XVII, No. 2, October, 1932.

their standard of justice the statue of the beauteous and unseeing lady who holds in her hands the scales on which all the elements of any dispute are nicely weighed, but also by those who "judge justice" by a relative standard, having due regard for the limitations of the human beings who must administer it. It is pointed out that lawyers, being advocates, cannot be expected to be disinterested; that juries often fail to reach a just verdict; and that judges sometimes display ineptitude in operating the scales. Legal terminology is characterized by some as being archaic, a characterization humorously illustrated by an indictment, repeatedly read in court, much to the merriment of spectators and jury and to the annoyance of judge and prosecutor, charging a slender and dignified youth with "riotously and routously" assaulting a powerful policeman.⁴⁷ In fact, almost every phase of legal procedure is criticized. It is said that from being a means of obtaining justice, procedure has become an end in itself; that attention is concentrated on form to such an extent that justice is often defeated.

The law's delay. The particular defect of procedure which is singled out for special attack, and which includes many of the other defects, is delay. Delay is not only the cause of prolonged annoyance and expense; but it is perhaps the most frequent cause of miscarriage of justice. It is an old grievance. Hamlet numbers among the thousand natural shocks that flesh is heir to "the pangs of dispriz'd love and the law's delay"; and the "head chancery," a hold by which a boxer clinches the head of his helpless opponent under his arm, is so named because it symbolizes the all but hopeless state of many cases which entered the British chancery courts in years gone by.⁴⁸

"Delay resembles the many-headed hydra of mythology," writes Professor Callender.⁴⁹ "It is an evil of many phases and very difficult of extirpation. It may appear at any stage of a lawsuit, be slain by a judicial Hercules, and appear again at a later stage. The many forms which it may assume make it difficult to attack. It is not an isolated problem. The delay may be the result of the procrastination of lawyers; it may be the result of an archaic system of pleading; it may be occasioned by the overcrowded condition of a court's calendar; it may be a consequence of faulty trial procedure; it may be the outcome of inadequate processes for enforcing a judgment; it may be the result of a complex judicial structure; it may be the consequence of a complicated system of appellate procedure, and so on."

Every issue of the *Journal of the American Judicature Society* has articles on this subject and suggestions for improving our judicial system.

⁴⁷ A. Hamilton, M.D., "What About the Lawyers?" *Harper's*, Oct. 1931, p. 546.

⁴⁸ But cases do not remain so long in chancery since Britain reformed her court system (1873).

⁴⁹ *American Courts* (1927 ed.), pp. 220-221. By permission of McGraw-Hill Book Co., publishers.

Witnesses change their residence, their memories grow dim, and some die before they are called to court. The patience and funds of an honest litigant may be exhausted while his unscrupulous opponent may finally win the case by artful dodges around the sinuosities of legal procedure. Some states have set about to correct this condition by revising the rules of judicial procedure and by establishing a more or less unified system of judicial administration. Although the progress is slow, with both professional and lay opinion agreed that procedure should be improved, it is reasonable to hope that the much needed overhauling is but fairly begun.

Defects in the jury system. Common indeed is the complaint against the jury system. Judge Claude C. Coffin of Colorado draws up the following incisive indictment of juries.⁵⁰ "The jury poll, supposed to be a cross section of the county community, is at the outset by statutory exemptions purged of occupational types wherein we should find the highest degree of intelligence and integrity; then the panel is further purged of busy, first rate business and professional men by individual excuses. From the 'qualified' list of jurymen remaining are drawn the required number who in large majority have never before served as jurymen and who have little or no training or experience for the work at hand. But this is still not the end of the process of selecting 'qualified' jurors. Attorneys may then by peremptory challenge remove from the list a certain number of those who seem more likely to give heed to the cause, which they are supposed to do, than to mind the parties and the pleaders, which they are supposed not to do." The judge has several other counts in his indictment. Judge John J. Parker of the Circuit Court of Appeals of the United States (Fourth District) finds the chief weakness of the jury system in the fact that judges in most of the states are not permitted to give juries the assistance they need to understand and evaluate the evidence, an authority the federal judges possess and use to good advantage.⁵¹

Yet neither of these judges nor other intelligent critics of the jury system want to see it abolished. On the contrary, they are certain of its place in a democratic system of government. What they insist upon is the reform of the system. The essential features of this reform would be to improve the personnel of the jury by severely limiting classes, professions and individuals who might be exempted or excused from service, and by giving the judge control of his court with the right and duty to assist jurors in weighing evidence. Other suggestions are that the number of jurors be reduced, that the unanimous verdict be abolished except perhaps in capital cases, that the jury be abolished for certain types of cases, and that jurors be made professional as are judges and lawyers. It has already been

⁵⁰ "Jury Trial Tragic But Not Entirely Hopeless," *Journal of the American Judicature Society*, XXV, 13 (June, 1941).

⁵¹ "Improvements of Jury System Must Come," *Journal of American Judicature Society*, XXVI, 71 (October, 1942).

noted that a number of states have made some progress on one or more of these lines.

Pretrial conferences. A movement which gives promise of relieving congested dockets and simplifying the administration of justice is that of having pretrial conferences. The judge meets the attorneys (and perhaps their clients) and an effort is made to consider and analyze the case. Although the main purpose of the conference is to bring about adjustments which will simplify procedure in a case, it often results in the settlement of a case. An example of the functions of the pretrial conference is furnished by an Ohio court. In 1940 this court held 270 such conferences on jury cases. Of these cases 103 were either settled or otherwise disposed of; jury trial was waived in 12 cases; and in nearly all of the other cases arrangements were made which expedited the trials. The employment of pretrial procedure is now common in the federal courts and in many of the state courts in a number of the states. Leaders of the bench and bar very generally commend it.⁵²

Defects peculiar to the criminal procedure. The same defects are generally apparent in both civil and criminal procedure; but there are certain procedural impediments peculiar to the administration of criminal justice. A few of these are given brief mention. Sometimes, the magistrates who conduct the preliminary hearings are not properly qualified for their tasks, and there have been those who were corruptible. Failure to hold a hearing, or to conduct one properly, often means that the criminal goes free. It is proposed that the common practice of popular choice of magistrates give way to appointments, or that persons without legal training be declared ineligible for the office, or both. So far there has been little action upon these proposals. The grand jury is very generally conceded to have become a "venerable nuisance," a time-consuming method of determining what the committing magistrate and the prosecuting attorney have already decided; namely, that there is a *prima facie* case against an accused. Fortunately, many states have realized these facts, and some have abolished the grand jury completely; while a number of others have discontinued its use except for investigating general disorders and widespread conspiracies, a function which the grand jury may still usefully perform.

Should the right to refuse to testify be abolished? The elaborate system of rights of persons accused of crime not infrequently operates to free the professional criminal who knows how to use them. No one questions the necessity of some of these rights, such as the right of public trial, the privilege of counsel, and the right to compel the attendance of witnesses on

⁵² George E. Brand, " 'Mighty Oaks'—Pretrial," *Journal of the American Judicature Society*, XXVI, 36 (August, 1942); Judge Carl A. Weinman, "Give Pretrial a Trial," *ibid.*, XXV, 24 (June, 1941). Pretrial is used in criminal as well as civil cases; see Judge Luther B. Way, "New Technique Facilitates Criminal Trials," *ibid.*, XXV, 120 (December, 1941).

behalf of the accused. But the same cannot be said so readily of the right of an accused to refuse to testify⁵³ or of the right of a witness to refuse to answer any question which would tend to incriminate him. In many civilized countries with superior systems of justice, this right does not exist. There is little doubt that it is an immunity which often prevents the uncovering of crime in this country. The criminal class jealously guards and frequently uses the right. Ordinarily the innocent man is willing, and often eager, to testify. The repeal of this right would make it more difficult for the guilty to escape, without depriving the innocent of adequate means of defense. Since the accused may not be forced to testify in court, it has long been the practice of many police investigators to make him give evidence following arrest, using threats and violence toward the accused if he refuses to talk. This "third degree" administered in jails and at police stations is roundly criticized by many authorities, particularly by the National Commission on Law Observance and Enforcement.⁵⁴ It would seem that if a person charged with a crime could be compelled to testify in court, there would no longer be any good excuse for permitting the long-winked-at lawlessness incident to the "third degree." Despite the arguments which may be made against retaining the right of refusal to testify, most criminal lawyers have a professional interest in its retention. To many others it is a venerable object of reverence on which no impious hand should be laid.⁵⁵

Viewing the subject of the administration of criminal law broadly, it may be said that there are too many survivals of medieval practice in our methods of attempting to cope with twentieth century criminals. True, there are isolated homicides, forgeries, and thefts; but the criminals who most seriously disturb the peace of society are organized and intelligent, as anyone knows who reads of the activities of gangs and racketeers.⁵⁶ This is shown from the inception of crime to the last effort to evade punishment. While considerable progress has been made in the direction of improved methods of apprehending criminals and some improvement in the legal machinery of prosecuting them is noticeable, the criminal class seems to manage to stay a few jumps ahead of the guardians of society. In combating the lawless, public officers must act lawfully, observing the niceties of constitutional and statutory restraints, a legal sieve designed to separate the innocent from the guilty, but through which the guilty often pass with the innocent. The best brains of the country are all but baffled

⁵³ It is generally held that comment by the prosecuting attorney upon the accused's failure to take the stand is a violation of his right to refuse to testify.

⁵⁴ *Report* (No. 11) on *Lawlessness in Law Enforcement*.

⁵⁵ For both sides of this question see Claire B. Bird, "Our Constitutional Protection of Guilt," *Journal of the American Judicature Society*, XXV, 18 (June, 1941) and Abraham Wekstein, "The Constitutional Protection Against Self Incrimination," *ibid.*, XXVI, 154 (February, 1943).

⁵⁶ Moley, "War on the Gang," *New York Times*, sec. 9, Aug. 30, 1931; and "The Racket," *ibid.*, August 9 and 16.

in their attempt to cure procedural defects. When we add to the difficulties mentioned the well-known fact that officers of the law are sometimes allied with the criminals they are supposed to apprehend and prosecute, the problem of "law enforcement" assumes an entirely new angle. Only an alert, if not outraged, public can rid itself of the traitors in its own house.

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The National Administrative System

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Preceding chapters have dealt with the historic branches of the government—executive, legislative, and judicial. But little has been said about the daily work of the government as it affects the lives of citizens. In past generations our government, along with most other governments, did not in fact touch the life of the ordinary citizen very closely. This condition has been greatly changed in the last century, especially during the last fifty years. The factory system, the concentration of population in small areas—indeed every feature of the industrial revolution has led governments to assume new functions.¹ The depression which began in 1929 forced governments to assume unprecedented tasks. It is a relatively simple matter for a legislative body to decide that a particular government shall undertake the performance of certain services; but the task of administering these functions is very complex. For this purpose, elaborate administrative machinery has been devised and hundreds of thousands of men and women have been employed.

In the remaining chapters of this volume, we shall deal with administrative organization and certain great functions of government. This chapter relates primarily to the administrative organization of the national government, although some reference is made to functions, particularly to the conduct of our foreign affairs and the postal service. The next chapter (19) is devoted to state and local administrative organization. Chapter 20 treats of administrative personnel—that great army of government employees who do the work. Taken together, these three chapters constitute a study of something approaching a fourth branch of government, the administrative branch. Chapters 21–26 relate exclusively to such important functions of government as the raising of revenues, the conduct of war, the regulation and promotion of commerce and business, the fostering of agriculture, the maintenance of peace and order, and the protection of health.

I. CONTROL OF THE ADMINISTRATIVE DEPARTMENTS ²

The Constitution does not provide specifically for any administrative departments, although it assumes their establishment in the provision that

¹ C. A. and Wm. Beard, "The Public Be Served," *Scribner's Magazine*, April, 1933.

² C. A. and Wm. Beard, *The American Leviathan* (1930), pp. 295–301; A. C.

the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," and gives authorization for their creation in the provision that Congress may "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

1. Control by Congress. Under this constitutional authority, Congress not only creates administrative agencies, but it also provides in great detail for their internal organization. It decides how many officers and employees shall be engaged, how they shall be chosen (with the exception of the heads of departments), and how much they shall be paid; what functions shall be performed by a department and each of its subdivisions; whether administrative officers shall have discretionary or only ministerial powers; and how much money shall be appropriated for the work of each department as a whole and for each of its branches. Furthermore, Congress may abolish a department or other administrative agency or any division thereof, or it may transfer a particular service from one agency to another. This is not a complete enumeration of the powers of Congress over administration; but it is sufficient to show something of the important nature and wide extent of those powers.

2. Control by the President. The President plays an important part in controlling administration also. He must "take care that the laws be faithfully executed"; that is, he must see that the work of the government is efficiently performed. Long ago we learned that he appoints the higher officers with the advice and consent of the Senate; that Congress has authorized the appointment of many "inferior" officers by the same method; that the President may at will remove officers so appointed.³ While the power to "hire and fire" in the public service must be exercised with some regard to political effect, it is, nevertheless, a powerful means of maintaining administrative standards. The constitutional powers to command the Army and Navy and to control foreign affairs, although the last-mentioned power is shared with the Senate, give the President an especially wide directing authority in these fields. But in practically every phase of administrative activity, Congress has by statute conferred supervising and directing authority upon the President. The result is that while Congress, often upon presidential recommendation, determines what functions the government shall undertake, how much money shall be spent upon them, and what administrative agencies shall perform

McLaughlin, *Constitutional History of the United States* (1935), Chs. XVI-XVIII; L. M. Short, *The Development of National Administrative Organization in the United States* (1923), Ch. I.; G. C. Thorpe, *Federal Departmental Organization and Practice* (1925), Chs. I-II; W. W. Willoughby, *Principles of the Constitutional Law of the United States* (1930 ed.), Chs. LXXVI-LXXVII.

³ See Ch. 10. sec. V.

them, the President and his immediate subordinates are left to work out the details and to exercise constant supervision over the officers and employees engaged in the daily work of administering these functions. The President thus has the position of commander-in-chief of the administrative forces of the government. Broad as his powers are, students of administration, as well as many statesmen, have felt that Congress should be even more liberal in delegating to him administrative powers, particularly in the direction of leaving him and his chief assistants more discretion with respect to administrative details. There is little doubt that the stoutest advocates of Executive power were fully satisfied by the action of Congress in granting to the President, in 1933, a wide range of powers to cope with the depression, or with the completeness and alacrity with which Congress delegates powers to the President in time of war.

3. Control by department heads. As everyone knows, Congress and the President rely chiefly upon the department heads for the performance of administrative duties. Congress is the board of directors, the President is the general manager, and the secretaries of the ten great executive departments are the heads of the different branches of the business of government. The powers and duties of a department head are numerous and important, but they are here summarized briefly.

(1) He supplies both the President and Congress with information, and often with advice. Acting as a group, the heads of departments serve as the President's Cabinet, assisting the Chief Executive in formulating policies.⁴

(2) The head of each department appoints a number of subordinate officers and employees, subject to civil service rules, to be explained in Chapter 20. He has also a limited power of removal.

(3) The head of a department serves as a sort of buffer between the President and the public, interpreting the policies of the President to the public and calming the feelings of those who may be adversely affected by a particular administrative decision or policy.

(4) He "goes to the front" for the employees of his department, defending them against unjust criticism, and seeking for them better working conditions and salary adjustments. He strives to keep up the morale of his employees by exercising just discipline, making fair promotions, encouraging study, and by any other means his ingenuity may suggest.

(5) In the chapter on "The President as Chief Legislator," mention was made of his rule-making, or ordinance, power. Often this power is exercised through the department heads. These officials are also authorized to issue rules and regulations for the conduct of their departments, and, in many cases, they are charged with the duty of filling in, in the form of administrative regulations, the details of statutes relating to broad func-

⁴ See Ch. 10, sec. II.

tions of government such as the regulation of immigration and the collection of customs.⁵

(6) Not only does the department head act in a sort of legislative capacity by elaborating statutes, but he also has functions of a judicial variety, in that he hears appeals from the rulings of minor administrative officials and decides other cases which come before him as a "court" of first instance. For example, the clerks in the land office make the original decisions in matters connected with the entry into public lands, and the Secretary of the Interior hears appeals from them; the immigration officials at a port make the original decisions concerning the right of a person to enter the United States, and the Attorney General is the final source of appeal from their decision; and the Postmaster General, acting upon information furnished him by subordinates, closes the mails to those who in his opinion are using them for fraudulent purposes. Where the points involved are only questions of fact, the decision of the department head is often final, as in the cases just mentioned; but if a point hinges upon an interpretation of law, appeal from the administrative decision lies to the regular courts.⁶

II. THE ORGANIZATION AND FUNCTIONS OF THE DEPARTMENTS ⁷

Before taking up the departments separately, it is in order to say just a word about their establishment. The First Congress under the Constitution, profiting from the experiences of the Confederation in attempting to manage executive affairs, established three executive departments, the Departments of State, Treasury, and War. It was thought by some congressmen that several other departments should have been created at that time; but the general fear in the states of the extension of the powers of the national government led the majority to hold the number of departments to the minimum and to group as many functions as possible within each department. As the work of the national government has increased, new departments have been added from time to time, taking over duties which the older departments could no longer perform and administering new functions as well. We shall consider the organization and functions of the ten departments which, despite the extensive use of commissions

⁵ J. P. Comer, *Legislative Function of National Administrative Authorities* (1927); James Hart, "The Exercise of Rule-Making Power," in the President's Committee on Administrative Management, *Report with Special Studies* (1937), pp. 310-355.

⁶ On Administrative Adjudication, see L. D. White, *Public Administration* (1939 ed.), Ch. XXXIV.

⁷ C. A. and Wm. Beard, *op. cit.*, Chs. X, XXIII, and pp. 421-432; Short, *op. cit.*, Chs. II-XIX; Thorpe, *op. cit.*, Parts II-XI; White, *op. cit.*, Chs. VII-VIII; S. Wallace, *Federal Departmentalization* (1941); *United States Government Manual*. The *Manual*, which is published three times a year, is invaluable. It explains the current organization of the Government and contains a number of organization charts.

and other agencies, still conduct the greater part of the national administration.

A. The Department of State

1. Organization. The Secretary of State is the ranking member of the President's Cabinet. He is usually a man in whom the President and the country have great confidence, although on occasion he is one who has been elevated to the position because of his place as a leader of the party. The list of Secretaries compares rather favorably with the list of Presidents. A number of them, including Jefferson and John Quincy Adams, have become President; and among those who were no doubt qualified for the presidency we find Clay, Webster, Hay, Root, and Hughes. Next to the head of the Department stands the Under Secretary of State, who acts for his superior in many routine matters and who assumes the Secretary's place during his temporary absence. It is impossible, of course, for the Secretary of State to exercise any detailed supervision over the many activities of the Department. Four Assistant Secretaries of State serve in this capacity, each Assistant Secretary having charge of a group of the Department's functions. A Legal Adviser assists the Department on the many legal questions which arise in connection with its work, while an Economic Adviser serves the Department in the important capacity indicated by his title. The Secretary of State has also an assistant and four special assistants, and four advisers on political relations. The officers named may be designated as the general directors of the Department. Under them function more than thirty divisions, offices, and bureaus in Washington, carrying out the various "headquarters" services, and under the same direction are our diplomatic representatives, consuls, and other foreign service officers. Despite the fact that the lines of the Department of State extend to the uttermost parts of the earth, it is the smallest of all the departments in the actual number of officers and employees.

2. General functions. The chief duties of the Department, as already indicated, are centered around the conduct of foreign affairs. Always subject to the President's direction, it has general charge of the negotiation of treaties; prepares instructions for our ambassadors and other representatives in foreign countries; issues passports to American citizens and extends protection to them when abroad; hears complaints of American citizens concerning alleged commercial discriminations in foreign lands, and seeks redress for them where such complaints are valid; receives similar complaints from foreigners, and offers redress where it is due; and performs a host of other duties, some affecting the country as a whole and others relating to particular individuals. Formerly, the Department had a great many purely domestic duties to discharge; but with the addition of new departments, it has been relieved of a number of such functions. Among the routine "home" functions for which it is still responsible are

included: the keeping of the seal of the United States; preserving in its archives the statutes and resolutions of Congress; proclaiming the adoption of constitutional amendments; and serving in general as the medium of communication between the national government and the states.⁸

3. The foreign service. The long arms of the Department of State extend to the capital of every country whose government is recognized by the United States and to every commercial center in those countries. The important duties at the capitals have to do with the knotty economic and political problems which frequently present themselves, and they are entrusted to the diplomats. The duties which relate primarily to more or less routine commercial affairs in the many centers of industry and trade are performed by consuls. We shall deal first with the diplomatic service.

(a) *THE DIPLOMATIC SERVICE.* Our chief diplomatic representative in a foreign capital is an ambassador or minister. The ambassador has the higher rank, and our representatives to the great powers and to some of the lesser ones bear that title. The President almost invariably selects ambassadors and ministers from his own party, often as payment of a political debt. It does not necessarily follow, however, that competent men are never chosen. Diplomatic qualities and the desirable political connection may be found in the same man. It should be added that in recent years there has been a commendable and growing tendency to select for the diplomatic posts, men who have worked their way up in the service, "career" men. The salaries, varying from \$10,000 to \$17,500, are smaller than other great countries pay, and in a number of capitals our representatives are compelled to draw liberally from their private incomes. It is impossible, for example, for anyone who is without a private fortune to represent us in London. Assisting the chief of the legation are various secretaries, clerks, technical experts, and sometimes interpreters, the number in each group depending upon the needs of the post. These are permanent officials and employees, now selected under the merit system, as we shall see below. Those of higher rank do a great deal of the important work of the embassy and constantly advise the ambassador or minister on many subjects.

The diplomat's duties. It is exceedingly difficult to classify the duties of the diplomat. Nor is it easy to draw the line sharply between diplomatic and consular functions. There is some overlapping in these services. Broadly speaking, the diplomat is supposed to carry out all the instructions of his government and keep his eyes and ears open for anything that may be of interest to it. He "negotiates, with tact, sound judgment, and intimate knowledge of conditions at home and abroad, protocols, conventions, and treaties especially regarding international intercourse, tariffs, shipping, commerce, preservation of peace, etc., in strict

⁸ For complete list of this department's activities, see *U.S. Govt. Manual*, latest issue.

conformity to Government instructions." He "analyzes and reports on political and economic conditions and trends of significance to the United States." He "makes effective representations to the authorities of foreign governments concerning the protection of American citizens, their rights and their property, in accordance with international law." He "establishes and effectively utilizes personal contacts in farsighted ways for the benefit of his Government and of American citizens." Above all, he "creates good will and common understanding, and, with restrained and critical leadership born of mature experience and profound knowledge of men and affairs, uses these as instruments for enhancing international confidence and co-operation among governments and peoples."⁹ He must, of course, manage his office efficiently and apportion work and responsibility among his assistants in such a manner as to obtain the best results. Speech making he cannot avoid; but he must always be careful of his utterances, embarrassing his government at no time, and at all times maintaining his personal dignity. These are a few of his duties.¹⁰ It is hardly necessary to add that in discharging them he must exercise the greatest caution and tact—he must be a diplomat.

(b) THE CONSULAR SERVICE. By treaty agreement with each power, arrangement is made for a mutual exchange of consuls. The United States is thus authorized to send its consular representatives to practically every commercial city of the world, and other countries in turn are authorized to send their representatives to the great commercial centers of the United States. Our representatives are classified as follows: consuls-general-at-large, who serve as inspectors of consulates; consuls-general, who have charge of all the consulates in a particular country or area; consuls, who administer particular consulates; and vice consuls and consular agents. Then there are various clerks, interpreters, and other assistants, as the needs may require. These officers are appointed by the President and Senate, subject to the merit system, to be discussed presently.

Duties of consular officers. A complete list of the duties of a consul would run through several pages. As stated above, they are primarily, although not exclusively, commercial. Here is a partial list. The consul analyzes and makes reports on market conditions, statistics of trade, systems of production, and similar economic matters in his district. He replies to trade inquiries from American citizens, always aiming to pro-

⁹ Department of State, *The American Foreign Service* (Sept. 1931), pp. 4-6. The Department, in this outline of the duties of the "Efficient Foreign Service Officer," does not draw a distinction between the duties of the diplomat and the consul; but the quotations indicate the more common duties of the diplomat. See also *The American Foreign Service* (1942), pp. 3-4.

¹⁰ For a lively account of the duties of an ambassador, see B. J. Hendrick, *Life and Letters of Walter H. Page*, Vol. I, pp. 159-161, or a quotation from these pages in C. A. and Wm. Beard, *The American Leviathan*, pp. 715-717. For an account of the work of a particularly alert diplomat see W. E. Dodd and Martha Dodd, *Ambassador Dodd's Diary* (1941).

mote good will and to help present and future trade relations. He certifies invoices of all goods shipped to the United States and makes reports on undervaluation, in order that our government may not be deprived of lawful revenue. He assists in preventing the importation of prohibited articles. He "enters and clears" American ships, administers relief of seamen, signs on and discharges seamen, settles disputes between them and their masters, and takes charge of shipwrecked vessels. He visas passports for foreigners who wish to travel in the United States, and issues visas to immigrants. He witnesses marriage ceremonies where one of the participants is an American citizen. Another duty consists of performing various notarial services. Yet another duty of the consul is that of administering and settling the estates of American citizens and sailors who have died abroad. The consul, especially the consul in a seaport, leads a busy life. In former times, consuls administered civil and criminal law, under certain conditions, among their fellow nationals in those countries whose legal institutions were deemed to be below Western standards. Recently this privilege of "extraterritoriality" has been surrendered in several countries. China, long the only important country in which the privilege was still allowed, withdrew it in 1943.

A CAREER IN THE FOREIGN SERVICE. Some attempts were made by Cleveland, Roosevelt, and Taft to put the diplomatic and consular service on the merit basis; but the Rogers Act of 1924, as amended by an act of 1931, reorganized and improved both services in several particulars, and we shall limit ourselves to these acts. In the *first* place, all officers of either service, except ambassadors and ministers, while retaining the appropriate titles of "secretaries," "consuls," etc., in the particular service to which they are assigned, are designated as foreign service officers and grouped in classes from I to IX according to their records and abilities. In the *second* place, admission to the service is by comprehensive written and oral examinations, which only the best college graduates who have taken courses and read with the foreign service in view can hope to pass. One does not take an examination for either the diplomatic or consular service as such; but rather, takes a general examination covering the whole field of the foreign service. As vacancies occur, candidates are selected in the order of their ratings on the examinations. They are not assigned to foreign service at once, but they are paid a salary of \$2,500 and are sent to near-by consular offices, where they learn something of the routine of the service. Then they are brought back to Washington for intensive instruction for a period of several months in the Foreign Service Officers' Training School, conducted by officials of the Department of State and experienced foreign service officers. After this, assignments are made to the diplomatic or consular service, depending upon the existing vacancies and the qualifications of the new officers. In the *third* place, it is important to note that foreign service officers may be transferred from one post to another at any

time; that they may be transferred from the diplomatic to the consular service or *vice versa*; and that they may be transferred to Washington to assist in the State Department for a period not to exceed four years. *Fourth*, salaries have been increased, making it possible for capable men without independent means to accept appointments. Salaries range from \$2,500 for the new unclassified foreign service officers to \$10,000 for the Class I officials. *Fifth*, promotion is by merit, and the law definitely encourages the appointment of foreign service officers of demonstrated special capacity to the grade of minister. Finally, the act of 1931 grades and classifies the clerks in the foreign service. Five classes of senior clerks and three classes of junior clerks are designated, with salaries ranging from \$4,000 down to \$2,500 or less. There is some criticism of the administration of these acts, but there is no doubt whatever that they have greatly improved the service. The criticism the layman most commonly levels at the foreign service, both as it functions in the State Department and in our foreign embassies and consulates, is that its officers are much too given to tradition and form, out of touch with democratic trends, and too "conservative."¹¹

B. The Treasury Department

1. **Organization.** In many respects, the most important department of the national government is that of the Treasury. Its organization follows the same general plan as the Department of State. An Under Secretary acts for the Secretary in various capacities and assumes full charge in his absence. Three Assistant Secretaries have more immediate charge of the twenty bureaus, offices, and divisions into which the Department is organized. The Under Secretary is likewise charged with the supervision of several such departmental units. In 1943 the number of officers and employees of the Department was about 100,000. Although the original intention of Congress was to make this Department peculiarly responsible to it by requiring the Department to report directly to it and by providing that Congress might make direct requests to Treasury officials for information, Presidents found out that, through the power of removal and otherwise, the Treasury Department could be brought under executive control. At present this Department is about as much under presidential control as any other, except, of course, the Department of State.

2. **Functions.** The Department has both fiscal and nonfiscal functions. All the customs duties and internal revenues are collected through the agencies of this Department. The actual work of collecting the tariff revenue is performed by officers stationed at about three hundred "ports

¹¹ On the needs of the State Department, see W. T. Stone, "Overhauling Our Diplomatic Machinery," *Current History*, February, 1930, pp. 896-901; H. Herring, "The Department of State," *Harper's*, February, 1937, pp. 225-238; *Fortune*, "State Department," December, 1939, p. 45.

of entry," grouped for convenience of administration into fifty-one customs collection districts. Internal revenues—income taxes, inheritance taxes, tobacco taxes, and so on—are gathered by an internal revenue collector and assistants in each of the sixty-seven districts into which the country is divided for that purpose. Various bureaus in the Department control the currency from the administrative standpoint: the Bureau of Engraving and Printing has charge of the making of the paper money, bonds, and stamps; the Bureau of the Mint looks after the coinage of money; the Bureau of the Comptroller of the Currency exercises general supervision over the national banks; and the Secret Service Division busies itself with preventing the counterfeiting of the securities and currency of the United States. The Treasury Department must also serve as custodian of the government's funds, and pay its bills. In charge of this function is the Treasurer of the United States (a subordinate officer of the Department to be distinguished from the Secretary of the Treasury). Some of the money is kept in Washington; but the greater part of it is deposited for the government in banks scattered throughout the country, a large portion of it being kept in the twelve federal reserve banks.¹²

Almost from the beginning, Congress has had the habit of assigning nonfinancial functions to the Treasury. Some of these were transferred to other departments upon their establishment, but among those that remain may be mentioned the Coast Guard Service (operates under the Navy Department in time of war), charged with the duty of preventing smuggling and other infractions of the laws; the Division of Secret Service, which guards our Presidents, in addition to its other duties, and a Bureau of Narcotics to administer the antinarcotic laws. With the advent of national Prohibition, the enforcement of Prohibition laws naturally fell to the Treasury Department, since it had previously collected the internal revenues on intoxicating liquors. This arrangement later proved unsatisfactory and in 1930 Prohibition enforcement was transferred to the Department of Justice. After the repeal of Prohibition a division of Federal Alcohol Control Administration was established in the Treasury Department. Its functions are now consolidated with the activities of the Bureau of Internal Revenue. Until recently the Public Health Service was a unit of the Treasury Department.

C. The War Department

The war and defense functions of both the War Department and the Department of the Navy will be rather fully discussed in Chapter 26. At this point it is necessary to mention only those duties which do not relate directly or exclusively to defense. Formerly, as in the case of the other original departments, the War Department administered a number of

¹² The financial functions of the Treasury are discussed more fully in Chapter 21.

special functions, including naval defense, Indian affairs, and the distribution of public lands to veterans. All of the functions named and practically all other non-military functions have long since been transferred to appropriate departments. For many years the Philippines were under the supervision of the War Department, but with the passage (1934) of the act designed to give independence to the Philippines in 1946, the War Department was relieved of most of its duties respecting those Islands. The Department still has, however, two functions which might be regarded as only semimilitary. The Army has a highly trained group of engineers whose talents the government utilizes for such good purposes as the construction of dams and bridges, and the improvement of rivers and harbors. As everyone knows, the Panama Canal, the "big ditch," is the work of Army engineers. And this leads to the second semimilitary (and the "semi" can be left out in time of war) function, the supervision of the Panama Canal and the Canal Zone. Serving under the direction of the Secretary of War, the Governor of the Panama Canal is responsible for the maintenance and operation of the Canal and for the government of the Canal Zone.

D. The Department of the Navy

This Department has never been charged with many responsibilities and duties other than those relating directly to the task of the Navy as an arm of the national defense. Yet it does administer certain functions which, although closely allied with the defense problem, have a somewhat broader significance. An Office of the Department of the Navy is that of Island Governments and Island Bases. It functions under the direction of the Chief of Naval Operations, and it assists the Secretary of the Navy in his supervision of civil governments in islands such as Guam, American Samoa, (both in enemy hands in 1943) and other possessions of the United States when placed under naval administration. Under the cognizance of this Office also are the affairs of those island bases on territory recently leased from Great Britain and other nations, to the extent that those affairs affect international relations. The authority covers, for example, negotiations on the questions of the acquisition of land and aids to navigation.

The Hydrographic Office makes surveys on the high seas and in foreign waters, collects and distributes information of hydrographic and navigational significance, prepares maps and charts, issues sailing directions, and in similar ways serves the United States Navy and navigators generally. The Naval Observatory at Washington, D.C., broadcasts time signals during the last five minutes of every hour. These signals are used by navigators to determine chronometer errors and positions, and by surveyors, and other scientific workers for the determination of position, the measure-

ment of gravity, and for other purposes. Our standard time is determined by the Naval Observatory.

The United States Coast Guard. Under the jurisdiction of the Navy in time of war and of the Treasury in time of peace, the Coast Guard performs indispensable services on a wide variety of matters relating to navigation. As the federal police on water, it is responsible for the enforcement of any law of the United States upon its navigable waters and the high seas, a function which relates particularly to the prevention of smuggling and the enforcement of the customs laws and the protection of the Alaskan fisheries. It saves life and property on the seas, along the coasts, and on the Great Lakes by rendering assistance to vessels in distress, extending medical and surgical aids to the crews of vessels of the United States engaged in deep-sea fishing, transporting shipwrecked and destitute persons, and the suppression of mutinies on merchant vessels. It maintains safety through such activities as the enforcement of rules and regulations governing vessels in the territorial waters of the United States, the exercise of supervision over the loading and unloading of explosives and other dangerous cargo, the detection and prevention of sabotage to shipping, the destruction of derelicts, the operation of the North Atlantic ice patrol, and the taking of weather observations on transoceanic air routes. It establishes and maintains such navigation aids as lighthouses, lightships, radio beacons, radio direction-finder stations, buoys, and unlighted beacons. The Coast Guard maintains its own academy at New London, Connecticut, for the training of cadets for commissions in this service.

Since February, 1941, a Coast Guard Reserve and a Coast Guard Auxiliary discharge important defense functions. The former is a military organization, the purpose of which is to form a reserve upon which the Coast Guard can draw for the performance of such extraordinary duties as emergency may require. It is primarily for service on the beaches. The Coast Guard Auxiliary is a nonmilitary organization, composed of citizens who are owners of motorboats and yachts, who are interested in the promotion of more effective use of the same and in facilitating the operations of the Coast Guard.

E. The Department of Justice

1. Functions. The legal arm of the government from the executive standpoint is the Department of Justice. It must be carefully distinguished from the judiciary. The judiciary hears and decides only litigated cases; it gives no legal advice to officers of the government and it does not prosecute offenders. These two functions constitute the main duties of the Department of Justice. In giving legal advice or opinions, the Department limits itself to answering concrete legal questions presented by the President or other high administrative officers.

Opinions of the Attorney General are, of course, somewhat in the nature of judicial decisions. They are commonly accepted as precedents in the executive departments, and they are often conclusive on the points of law involved, since many questions presented to the Attorney General never arise in courts of law. As already stated, the second important duty of the Department of Justice is to prosecute those who violate the laws of the United States. Action against violators of the revenue, immigration, anti-trust, espionage, and other laws is regularly brought before the district courts by the district attorneys, representing the Department. Representatives of the Department must also defend the United States in the claims cases which may be brought against it in the district courts or in the Court of Claims. In addition to the duties mentioned, the Department administers the Immigration and Naturalization laws, the federal prisons, the federal parole system, and advises the President with respect to the granting of pardons.

2. Organization. The few duties which fell to the Attorney General in 1789 were held to be insufficient to warrant the creation of a special department for him. But, with the growth of the activities of the national government, particularly after the Civil War, the necessity for such a department was obvious, and it was duly constituted in 1870. Working with the Attorney General in Washington at present is a Solicitor General, who represents the United States in court in certain important cases; six assistant attorneys general, each charged with the supervision of some phase of the activities of the Department; and a number of subordinate officials. The Federal Bureau of Investigation (Mr. J. Edgar Hoover and his G-men) is a unit of the Department of Justice. In each of the ninety odd districts into which the country is divided for purposes of judicial administration, is a district attorney, who, with the necessary assistants, serves the United States as a prosecuting attorney serves a state. Also in each district there is a marshal, who is a "federal sheriff," and the requisite number of deputy marshals. These field officers are appointed by the President for a term of four years, and they serve under the supervision of the Department of Justice.

This Department is much concerned in time of war with the problem of enforcing laws against sedition and sabotage and with the administration of laws respecting alien enemies. Wide powers are granted to the Department for these purposes, and they may be used in a most oppressive manner or they may be used with moderation. In 1917-1920 the Attorney General took vigorous action on all fronts, and was severely criticized by eminent members of the bar for his excessive zeal. With the entrance of the United States into the Second World War, the Attorney General made it clear that his office would use its powers with that restraint which should characterize any great government of the people, and this pledge seems to have been kept.

F. The Post Office Department

The Department with which the citizen is most familiar is that of the Post Office. It is the government's greatest business enterprise and it is a government monopoly. It employs well over 300,000 persons, who receive and distribute millions of pieces of mail each day. In its fifty thousand post offices and branches it does an annual business amounting to a little less than a billion dollars. The cry often goes up, "Keep the government out of business"; but seldom, if ever, is this made applicable to the postal service, perhaps the greatest business on earth.

The expansion of the postal service. The postal service as we know it is quite a modern development. A century and a quarter ago the charge for carrying a letter a few hundred miles was almost prohibitive for poor people. The mail service was used little, and post offices were few and far between, many of the rural inhabitants living twenty-five miles or more from the nearest office. But from the time the postal establishment was placed in the Treasury Department in 1789, and particularly since about 1850, the postal service has been expanded. The Postmaster General was given a seat in the Cabinet in Jackson's time (1829), and about the same time his division began to function somewhat as an independent department, although it was not given the full legal status of a great department until 1874. At present the high officers of the Department, in addition to the Postmaster General, are the four Assistant Postmasters General, each in charge of a number of "divisions" of the Department, each division being under the immediate supervision of an appropriate chief. Other important officers of the Department are the Chief Clerk, the Chief Inspector, the Purchasing Agent, the Controller, and the Solicitor. A partial summary of the growth of the Department's services is very enlightening. The registration system was introduced in 1855; urban free delivery in 1863 for cities of over 50,000 inhabitants, a delivery which is now authorized for all cities of 10,000 inhabitants and for other places in which the gross receipts amount to \$10,000 a year; rural free delivery in 1896, by which about 25,000,000 people are now served; the money order system in 1864; "special delivery" in 1885; the postal savings system in 1911; the parcel post service in 1913, now carrying millions of parcels a month; and the air mail service in 1918, which now covers thousands of miles in the United States and connects with lines covering, in normal times, the civilized world.

The Postal Union. Mail must be carried between inhabitants of different countries as well as between the residents of any particular country. Formerly, this was arranged by each nation through an agreement with every other nation. Many treaties and agreements were necessary, there was considerable confusion, and the cost of delivering mail to the far corners of the earth was often excessive. In 1874, to remedy these defects a

number of governments united to establish the Universal Postal Union. The word "universal" in the title is no idle pretension. It is a "league of nations," to borrow Judge Manley O. Hudson's term, including, in time of peace, more than 160 countries, colonies, and territories. With headquarters at Berne, this Union functions quietly and smoothly, has little part in world politics, and perhaps for that reason its great services are practically unknown to the general public. Yet it has immeasurably simplified the carriage of foreign mails, and it has lowered the cost in many cases from dollars to cents. A letter to a person in France which formerly cost seventy-five cents now costs five cents, the rate to most foreign countries. Under the postal agreements administered by this Union, parcel post, insured matter, money orders, and other material are carried. No sane person would advocate the abolition of the Universal Postal Union.¹³

Private enterprise and the mail service. The administrative officers of the Post Office Department, the employees who serve you at the local post office, the carrier who brings the mail to your door, and many other persons connected with the mail service are in the employ of the government. But for the transportation of the mails on land, water, and in the air, the government relies primarily upon contracts with common carriers. Broadly speaking, it may be said that the railroads are paid no more than a fair rate for carrying mail, although it is sometimes said that they receive more than the service is worth. Steamship and air transportation companies are frankly paid sums substantially in excess of a fair return, for the purpose of encouraging and aiding ocean and air transportation. This policy may be highly desirable; but it is to some extent, at least, a departure from "business principles." Post offices are commonly built and owned by the government. Because of the activities of local civic clubs and business men (who at the same time, with no conscious show of humor, say that government should be conducted on a business basis) in exerting pressure upon the district representative in Congress, buildings are sometimes erected at a cost which corresponds more nearly to the extravagant claims and pride of a community than to the actual needs of the mail service. Some buildings are rented, and, in securing them, the government is again subject to political pressure in determining the places to be rented and the amount of rent to be paid, a condition which has more than once resulted in scandal and near scandal.¹⁴

Postal rates. In fixing postal rates, the government must consider more than the cost of carrying each class of mail. It must consider the claims and needs of various groups, and it must perforce yield in rough proportion to the political strength of the groups urging them. Publishers are joined by many others in saying that the government should help inform and educate the public by making "literature" available to the great body

¹³ N. L. Hill, *International Administration* (1931), pp. 12-13, 168-171.

¹⁴ C. A. and Wm. Beard, *op. cit.*, pp. 426-429.

of citizens *via* the lowest possible postal rates. In response to this claim, Congress has been rather generous. Educational, scientific, religious, and numerous other publications are distributed for a relatively low charge, and deficits from carrying such matter must be made up in profits from other classes of mail and from appropriations by Congress. Literature for the blind is carried free, and so are the publications of agricultural colleges and experiment stations. No charge is made, of course, for the billion pieces of mail carried each year for the national government. With these considerations in mind, one can understand why the Department's annual expenditures usually run slightly beyond its income. Carrying the mail is a business, but it is much more than a business; it is a great social service which cannot be fairly measured by profits and losses.¹⁵

G. Department of the Interior

The Department of the Interior corresponds in a general way to what is often called the "Home Office" in other countries. Its functions, relating to matters of domestic concern, were formerly divided among other departments which seemed best fitted to administer them. It was not until 1849 that Congress collected these functions and created the Department of the Interior to deal with them. Like most other departments, it now has a rather elaborate organization. The Secretary, Under-Secretary, and two Assistant Secretaries are in general charge of the offices, bureaus, and commissions which are immediately responsible for the several services of the Department.

Its functions. This Department's most important work is to administer the laws relating to the public lands. This function is discussed in Chapter 24, section II. The Department has a number of other duties which cannot be easily classified. The health, education, and general supervision of our 340,000 Indian citizens living on many reservations is entrusted to the Bureau of Indian Affairs within this Department. The Department's Bureau of Mines is concerned with the safety of miners, the testing of fuels for the Government, and the production of helium gas for the Army and Navy air services, to mention three of its functions. Within this Department are located the National Park Service, Fish and Wildlife Service, the Bureau of Reclamation, the Division of (electric) Power, the Division of Territories and Island Possessions, the Petroleum Conservation Division, and still other divisions and services. Until 1939, the Office of Education was in this Department, when it was transferred to the Federal Security Agency. The Interior Department has war functions relating to the conservation of both petroleum and solid fuels. Some of the

¹⁵ *Ibid.*, pp. 429-431. The "average ignorant man" often says, "the Post Office goes in the hole each year because it carries Congressmen's mail free." This mail represents about one per cent of the Department's business.

worst administrative scandals have arisen in this Department in connection with the administration of the public lands and in dealing with the Indians. It might not be too difficult to show that among the principal qualifications for its secretaryship are a suspicious nature, a reformer's zeal, and singleness of purpose.

H. The Department of Agriculture

Although not given the full dignity of a department until 1889, a federal agricultural service was maintained by a so-called "department" after 1862. The present Department of Agriculture is one of the most efficient and satisfactory of all the executive departments. Its work is primarily scientific and technical. In its administration it is largely free from political interference, having a very high percentage of its employees under the merit system. The movement for science and economics in agriculture has greatly increased its importance in recent years.

Services. It maintains Bureaus of Animal Industry, Home Economics, Dairy Industry, Plant Industry, Agricultural Chemistry, and Engineering Soils, Entomology and Plant Quarantine, Agricultural Economics, a Soil Conservation Service, and several "administrations" conducting research and issuing bulletins on many phases of the farm problem. While these services benefit the farmer primarily, they are also worth a great deal to the general public. The Department maintains an elaborate extension organization through which information is distributed to agricultural colleges, farm organizations, and directly to the farmers themselves. In this direct connection with the farmers the radio plays an important part. This is but a partial summary of the functions of this great Department, which engages 6,000 or 7,000 persons in its offices at Washington and approximately four times that number in agricultural activities in practically every section of the country. Much of the work of this Department is now (1943) directed toward food production for war use. We shall learn more of the work of the Department in Chapter 24.

I. The Department of Commerce

This is next to the youngest, but, until 1933, one of the busiest departments. The joint Department of Commerce and Labor was created as a result of agitation on the part of business and labor, particularly after they had seen Congress bow to the will of the agricultural interests in 1889. The joint arrangement was not satisfactory to labor; so that Congress yielded in 1913 and established the tenth and last department, the Department of Labor. The Department of Commerce is conducted, of course, by the Secretary, Assistant Secretaries, and a number of important directors, commissioners, and chiefs of divisions. As everyone knows,

this is the Department which Mr. Hoover directed for more than seven years preceding his elevation to the Presidency. The new "temple of business" is the largest building in Washington. It has 3,311 rooms, and houses all the Washington units of the Department except the Bureau of Standards.

Its functions. A general idea of the work of this Department may be gained by an enumeration of its bureaus, administrations, and corporations. Its bureaus are those of the Census, Foreign and Domestic Commerce, Standards, and Weather, the last of these having been transferred from the Department of Agriculture in 1940. To Commerce also belong the Patent Office, the Coast and Geodetic Survey, and the Civil Aeronautics Administration. In February, 1942, a number of other administrative agencies, chiefly those relating to the war program, were transferred to the Department. A partial list includes the Reconstruction Finance Corporation, the Defense Plant Corporation, the Rubber Reserve Company, the Metals Reserve Company, the Defense Supplies Corporation, and the Import-Export Bank of Washington. Nearly all of the permanent services of the Department of Commerce will be discussed in Chapter 23.

J. The Department of Labor

The tenth and last of our great executive departments was created to foster, promote, and develop the welfare of American wage earners, by improving their working conditions and increasing their opportunities for profitable and productive employment. This Department administers the Bureau of Labor Statistics, the Children's Bureau, and the Women's Bureau. Under its direction also function the Public Contracts Division, the Wage and Hour Division, the Division of Labor Standards, and the United States Conciliation Service. Formerly the United States Employment Service and the Immigration and Naturalization Service were located in this Department, but they were recently transferred to other administrative agencies. The major services of the Department of Labor are discussed in Chapter 23.

III. OTHER ADMINISTRATIVE AGENCIES ¹⁶

Until about 1880, practically all of the administrative work of the national government was carried on by the executive departments as outlined above. This is true no longer. Scores of commissions, boards, corporations, administrations, and other authorities now have a large share in the execution of national policy, and some of these agencies rival the execu-

¹⁶ Robert E. Cushman, *The Independent Regulatory Commissions* (1941); L. D. White, *Introduction to the Study of Public Administration* (1939 ed.) Chs. VIII-IX; C. H. Woody, *Growth of the Federal Government, 1915-1932* (1933); *United States Government Manual*, Fall, 1942, pp. 56-144, 375-561.

tive departments in the importance of their functions and in the number of their officers and employees.

The independent commissions. The type of administrative agency outside the executive departments which has received the greatest amount of attention is the so-called "independent" commission. The oldest and most independent of all of these is the Interstate Commerce Commission, established in 1887 by act of Congress. It was the purpose of Congress to create an agency responsible to itself and to the courts, but relatively independent of the President. This is what is meant by an independent commission, one independent of the President. Such commissions find their independence of the President in these facts: the members of commissions serve longer terms than the President and only one member retires at a time; the President cannot remove members of the commissions except for causes stipulated in the statutes (it will be recalled that he can remove "executive officers" for any cause—for the good of the service); the decisions of the independent commissions are independent—they do not go to the White House for approval; and, finally, these commissions have no channel of communication with the White House.¹⁷ Other independent commissions than the I.C.C. include the Federal Trade Commission (1914), the Federal Power Commission (1920), the Securities and Exchange Commission (1934), the Federal Communications Commission (1934), which took over the work of the Radio Commission and certain functions which had been administered by the I.C.C., and the National Labor Relations Board (1935). These commissions vary somewhat in the degree of independence they exercise, with the I.C.C., as stated above, leading in this regard. The statutory independence they enjoy may not differ greatly, but some commissions may not mind White House suggestions, may even feel impelled to seek them. And then, it should be explained that not every administrative agency which has the word "commission" in its title is supposed to be independent. For example, the Civil Service Commission, created back in 1883, was never an independent commission, but has always functioned close to the President. In order to learn what commissions are independent and what commissions are not it is necessary to consult the statutes and the judicial decisions. This is not an easy task, and authorities differ on the exact number of independent commissions now in existence.¹⁸ A round dozen is probably not far off.

THEIR FUNCTIONS. These independent agencies were not created with the idea of taking over the regular work of the executive departments, but for the purpose of administering certain new and complex functions for which departmental organization was deemed (perhaps erroneously in a number of cases) to be inadequate. The departments are designed primarily to conduct administrative work proper, while the nature of the

¹⁷ White, *op. cit.*, p. 113.

¹⁸ *Ibid.*, p. 112.

service to be rendered by the boards and commissions often requires that they be given powers of a quasi-judicial and quasi-legislative character, as well as strictly administrative authority. Technically, the commissions do not have the power to make laws; for it is held that only Congress may make laws. But, since Congress often passes only broad and general acts on certain subjects, leaving commissions to fill in the details by their own rules and regulations, the commissions do, in effect, serve as subordinate legislative bodies. Similarly, from the technical point of view, the commissions are not courts. Nevertheless, a number of them may conduct hearings, make decisions, and issue orders very much as courts, and, in many cases, appeals may be had from them to the regular federal courts, just as cases are appealed from a lower to a higher federal court.¹⁹ As a matter of fact the administrative departments now have many such legislative and judicial powers; so that the arguments for commissions are not as strong as they used to be.

ORGANIZATION. The commissions have a plural membership of three, five, or a larger number of men. It is generally held that a group can be more safely entrusted with the duties of formulating policies, issuing regulations, and making important decisions of a judicial character than can a single individual. Furthermore, since the personnel of a commission is never changed completely at one time, a greater continuity of policy may be expected from a commission than from a single director. Another strong argument for the plural character of the commission is that it makes possible the representation of various interests—economic, social, and otherwise—in its membership. In this connection it should be stated that provision is often made for representation of both the great political parties on a commission—an arrangement which gives satisfactory results in some cases, but in others, only partisan majority decisions. A commission is organized internally more or less in accordance with the needs of the service it performs. The commissioners devote most of their time to major problems which demand their consideration and decision. The routine work is performed by a secretary of the commission and various technical bureaus created for the purpose. Thus, the Interstate Commerce Commission has thirteen bureaus and some other services, and has on its rolls several thousand officers and employees.

Government corporations. An administrative device with which the public has become familiar in recent years is the government corporation. It is not, however, as new as the commission; it is its increasing use rather than its novelty that has made the public conscious of it. Even the old Continental Congress created a government corporation, the Bank of North America, and the First Congress under the Constitution chartered the Bank of the United States. It was not until the First World War, however, that Congress found much use for the corporation, when it

¹⁹ C. A. and Wm. Beard, *op. cit.*, pp. 306-307.

created the War Finance Corporation and several others for the period of the emergency. It was the depression of 1929 and succeeding years which brought the government corporation to full flower. Who has not heard of the Reconstruction Finance Corporation (the first of these, chartered in 1932, before the New Deal) the Home Owners' Loan Corporation, the Federal Deposit Insurance Corporation, the United States Housing Corporation, the Tennessee Valley Authority, and perhaps others? At this time there are around 100 government corporations, with assets running into billions. The corporation is supposed to have the following administrative advantages: its policy is controlled by a board of directors and its business is managed by an administrator; it enjoys more freedom from legislative interference than other types of administrative units because it usually has the authority to raise, spend, or save its own funds; its relationship with the Chief Executive is extremely flexible; and it usually has the privilege of selecting its personnel free from civil service restrictions. Some of these advantages are dubious, particularly the last one mentioned. And it is a fact that other types of administrative agencies may be set up in such a manner as to enjoy certain of the advantages claimed for the corporation. The full evaluation of the corporation must await their use over a more extended period of time.²⁰

Other administrative agencies. There are yet other types of administrative organizations, units which are not in any executive department, and which are neither commissions nor corporations. These are usually headed by executive officers who are very definitely responsible to the President. One of these is the Federal Security Agency, which includes the Civilian Conservation Corps, the National Youth Administration, the United States Office of Education, the Public Health Service, the Social Security Board, and the Food and Drug Administration. There is the Federal Works Agency, which includes the Public Buildings Administration, the Public Roads Administration, the Public Works Administration, and which did include the Work Projects Administration until it was discontinued (1943). The Federal Reserve System is a well-known agency and so is the Veterans Administration. It is quite unnecessary to run through the entire list. Let it suffice to say that at appropriate points in succeeding chapters attention will be given to the functions of the more important of these agencies.

EMERGENCY WAR AGENCIES. There are some two score of these agencies, some established by executive authority alone and others authorized by Congress. A few of these units operate within the Department of the Interior or the Department of Commerce, but the others either function directly under the Chief Executive or report directly to him. Within the Office for Emergency Management (established by Executive Order, May, 1940) are the Board of War Communications, the National War Labor

²⁰ White, *op. cit.*, pp. 125 ff.

Board, the Office of Civilian Defense, the Office of the Co-ordinator of Inter-American Affairs, the Office of Lend-Lease Administration, the Office of War Information, the War Manpower Commission (which now includes the Selective Service System), the War Production Board, and a few other agencies. Among the administrative units for war which are not under the Office for Emergency Management are the following: the Office of Price Administration, the Board of Economic Warfare, the National Housing Agency, the Office of Economic Stabilization and the Office of Censorship. Then there are various joint boards and committees—United States–Canadian and United States–British. Although these war agencies are for the period of the emergency, the emergency will not immediately pass with the end of hostilities, and we may expect to see a number of these units in operation for some years after peace has been proclaimed. Chapter 26, "The United States at War," covers some of the activities of the war agencies.

IV. THE PROBLEM OF REORGANIZING THE NATIONAL ADMINISTRATION ²¹

Defects of present organization. No discussion of the national administrative system, however brief, is concluded without reference to the need for reorganization. It has been shown that new services have been added as demands for them became insistent; that these services have been frequently sandwiched into whatever existing department happened to be able to provide a place for them, with scant regard for the illogic or practical difficulties of the arrangement; and that, since 1913, this process has been greatly accelerated, not only by the establishment of bureaus and divisions in the departments, but particularly through the creation of numerous agencies independent of the executive departments. As a result of this policy (or lack of policy) several departments have been saddled with service bureaus whose functions have little or no relation to the primary work of such departments. For example, the Public Health Service was until recently in the Treasury Department and the Department of the Interior formerly had so many unrelated functions that it was sometimes characterized as a rag bag. A second result was that many services which should have been closely associated were located in different departments. A third result was manifest in the lack of an administrative organization with adequate powers to control the entire administrative branch. It is true, of course, that the President has always been empowered to control the administrative forces of the departments; but

²¹ L. Meriam and L. F. Schmeckebier, *Reorganization of the National Government; What Does It Involve?* (1939); L. F. Schmeckebier, *New Federal Organizations: An Outline of Their Structure and Functions* (1934); President's Committee on Administrative Management, *Report with Special Studies* (1937), pp. 31-47; L. M. Short, *Development of National Administrative Organization in the United States* (1923), Ch. XXIII.

without a staff of assistants, this control could not be made effective and his authority over the various boards and commissions was only nominal.²²

Reorganization proposals. These defects and a number of others were clearly revealed in the elaborate report (1911) of President Taft's Efficiency and Economy Commission. This Commission recommended a number of changes in the administrative system, and the President passed them on to Congress with his approval; but as he had lost his leadership, the lawmakers on Capitol Hill practically ignored the recommendations. Wilson and his Congress were busy with other legislation and later with the conduct of the war.

The problem of administrative reorganization was not seriously tackled until 1920, when Congress created a Joint Committee on Reorganization, composed of three members of each House and (after 1921) a representative of the President. Responsible private research establishments immediately prepared plans for the consideration of the Joint Committee, the most comprehensive schemes being presented by the Institute of Government Research of Washington, D.C., and the National Budget Committee of New York City. Bills based somewhat upon these and other studies were introduced in Congress from time to time, but there was no general interest in the period of golden prosperity in such a dry subject as administrative reorganization. It probably sounded too much like reform. A few desirable adjustments were made, however, in Hoover's Administration. In 1933, when the country was at the bottom of the depression, Congress authorized the President to make sweeping changes in administrative organization. He did make a number of significant consolidations and transfers; but while this was being done, New Deal agencies were being created almost from day to day, so that reorganization did not keep pace with administrative expansion.

The Report of the President's Committee on Administrative Management. In 1936 President Roosevelt appointed a committee of experts (Louis Brownlow, Chairman, Charles E. Merriam, and Luther Gulick) to make recommendations on the national administration. In January, 1937, the committee made its far-reaching (some have said daring) report to the President. The President approved it and passed it on to Congress with the request that legislation be enacted to carry out the recommendations of the committee. Those parts of the report which have to do with administrative organization are here summarized.

Concerning the organization of the executive branch as of 1936, the committee made the following observations:

"1. The structure of the Government throws an impossible task upon the Chief Executive. No President can possibly give adequate supervision to the multitude of agencies which have been set up to carry on the work of the Government, nor can he co-ordinate their activities and policies.

"2. The normal managerial agencies designed to assist the Executive in think-

²² Short, *op. cit.*, pp. 469-470.

ing, planning, and managing, which one would expect to find in any large-scale organization, are either undeveloped or lacking.

"3. The constitutional principle of the separation of powers and the responsibility of the President for 'the executive Power' is impaired through the multiplicity and confusion of agencies which render effective action impossible.

"4. Without plan or intent, there has grown up a headless 'fourth branch' of the Government, responsible to no one, and impossible of co-ordination with the general policies and work of the Government . . .

"5. For purposes of management, boards and commissions have turned out to be failures . . . When freed from the work of management boards are, however, extremely useful and necessary for consultation, discussion and advice; for representation of diverse views and citizen opinion; for quasi-judicial action; and as a repository of corporate powers.

"6. The conspicuously well-managed administrative units in the Government are almost without exception headed by single administrators.

"7. Owing to the multiplicity of agencies and the lack of administrative management there is waste, overlapping, and duplication, which may be eliminated through co-ordination, consolidation, and proper managerial control."

THE COMMITTEE'S RECOMMENDATIONS RESPECTING ADMINISTRATIVE ORGANIZATION. The Committee's proposal that a White House staff be established and the extent to which that proposal has been acted upon were discussed in Chapter 10. At present we are concerned with the executive departments. The committee recommended that the Department of the Interior be changed to a Department of Conservation, and it would add two new departments, Social Welfare and Public Works. The main feature of the committee's proposals was that all of the existing agencies of the Government—boards, commissions, authorities, and corporations, whether permanent or temporary—should be accommodated within the twelve departments. How would the committee place in the executive departments the independent regulatory commissions with their combined administrative, sublegislative, and quasi-judicial powers? It would divide each such commission into an administrative section and judicial section. The administrative section would simply take its place as a regular bureau or division of the department and it would be made responsible to the Secretary. This section would do all of the purely administrative and sublegislative work now performed by the independent commission. On the other hand, the judicial section would be placed in a department only for such purposes as the budget, personnel administration, and matériel. It would be wholly independent of the department and the President in its work. Its members would be appointed by the President with the approval of the Senate for long, staggered terms and would be subject to removal only under the terms stated in the laws. This judicial section would thus make decisions affecting the public interest and private rights in the same independent and impartial manner as the old regulatory commission.

The committee recommended, then, that every administrative agency

of the Government be placed in a department, but it recognized the necessity for flexibility in the arrangement. Some of the boards or commissions could be located in the departments as ordinary bureaus; others would function relatively free of the departments except in matters of personnel, supplies, and budgeting; still others would be placed in the departments only for the purpose of permitting the secretaries to receive their reports and co-ordinate their policies with those of the departments.

At least two other points in the committee's recommendations should be noted. The first is that, since the functions of government are constantly undergoing change, the administrative machinery which must carry out these functions must be adjustable in order to take care of the work to be performed. The second point is that, although Congress has the responsibility of fixing the general policy respecting administrative organization by providing, for example, for the twelve administrative departments, the detailed execution of this policy, including necessary adjustments from time to time, should be the responsibility of the President. The committee's proposals were most comprehensive, and the journalist who wrote that they knocked the breath out of Congress was not far wrong.

Reorganization since 1937. The Government Reorganization Bill of 1938 (an Administration measure) embodied a number of the principal recommendations of the President's Committee on Administrative Management, but this measure became associated with the President's unpopular plan to reorganize the judiciary and the charge of "dictator" was hurled at him from all sides—from senators and representatives, from Father Coughlin and Publisher Gannett, and from tens of thousands of others. There was some intelligent and patriotic opposition to the bill, but the opposition in general was more emotional than intelligent, more partisan than patriotic, and more effective than sound. Even after the President and his leaders in Congress had made a number of concessions, the bill, having passed the Senate, was beaten in the House after a bitter fight. The Reorganization Bill of 1939 was not sponsored by New Dealers but by moderates who were willing to exclude from it many of the provisions which had been points of attack against the bill of the previous year. After considerable parliamentary skirmishing this measure was passed.

The new law, effective until January, 1941, gave the President the authority to appoint as many as six executive assistants, the selfless six with "a passion for anonymity," as recommended by the Committee on Administrative Management. It gave him the authority, subject to Congressional veto which must be exercised within a period of sixty days, to transfer the whole or a part of the work of any federal agency except that of twenty-one named agencies. Among these "untouchable" agencies we find the Civil Service Commission, the Federal Communications Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, the National Labor Relations Board, the Tariff Commission, Veter-

ans Administration, and the General Accounting Office. This last named office includes the Comptroller General whose functions the President's bill of the year before would have divided between the Budget Director and a new officer, the Auditor General. The President was denied the authority to abolish or create a new executive department; and, in exercising the powers of "bureau shuffling" which the act permitted, he was required to take care that no functions performed by any bureau or agency were "lost in the shuffle."

Under the authority of the act the President submitted five reorganization plans which, not having been disapproved by Congress within the sixty-day period, became effective. It would be tedious and unprofitable to enumerate all of the changes made, but some samples of what has been done may be given. Reorganization Plan No. I brought the Bureau of the Budget from the Treasury Department and placed it under White House authority. The National Resources Committee, an independent agency, became the National Resources Planning Board, and was charged with the duty of carrying on studies for the White House. Several coordinating agencies were established, of which the Federal Security Agency is a good example. To this super-agency were brought scattered agencies having to do with the health and security of the people of the nation—the Social Security Board, the United States Employment Service, the Office of Education (from the Department of the Interior), the Public Health Service (from the Treasury Department), and the Civilian Conservation Corps. Other transfers indicated a similar plan to bring like functions within a single large organization.²³ In submitting Reorganization Plan No. IV (April 11, 1940) the President took the opportunity to recommend to the Congress that it extend the reorganization law which was to expire January 20, 1941. Furthermore, he recommended that all agencies be made subject to reorganization, and he intimated that no large reductions in expenditures could be expected as a result of bureau shifting as long as he was prohibited by law from discontinuing the functions of any agency whether or not such functions were necessary. Although Congress did not extend the life of the law, in December, 1941, it authorized the President to redistribute functions among the war agencies. The problem of administrative organization will continue. Under inadequate laws and unskilled executives the administrative setup will always lag behind functional demands. Even with adequate laws and capable executives the problem is never solved for long because changes in functions and the development of new administrative techniques will require changes in organization.²⁴

²³ *United States News*, May 1, 1939, p. 12.

²⁴ Lists of changes in the "Organization of the executive Branch of the National Government of the United States" are prepared regularly by L. F. Schmeckebier for the *American Political Science Review*. For the complete picture of current administrative organization see the most recent issue of the *United States Government Manual*.

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State and Local Administrative Organization

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In this chapter, following somewhat the plan of the last chapter on national administration, we shall first make a survey of state administrative organization. Since the problems of organization are quite similar in many respects in all areas of government, it is unnecessary, in the light of what was brought out in the previous chapter, to go into detail on the state administrative structure. We shall rather be content to point out certain special features and problems of state administration. Following this, we shall give brief attention to county and city government. Perhaps a strictly logical arrangement of topics would require that sheriffs, mayors, and other local executive and administrative officers be included in a chapter following the one on "The Governor"; and that county boards and city councils be brought up for discussion following the analysis of the state legislature. But it seems to the writer that this is pressing logic too far—to the point of confusion. Counties and cities are primarily administrative units, subject to the state, and concerned very largely with carrying out its functions. Hence, they may well be treated in a general work of this kind under the single title of "administration."

I. ADMINISTRATIVE ORGANIZATION IN THE STATES ¹

The growth of the tasks of administration. In the preceding review of national administration, we saw that the functions of the central government had been increased and that this development necessitated the construction of elaborate administrative machinery and laid new and complicated tasks before the administrator. The same development has taken place in the states. A century and a half ago, administrative activities were few and far between. There were no railroad or other public utility commissions, because there were practically no public utilities. There

¹ Bates and Field, *State Government* (1939 ed.), Ch. X; A. W. Bromage, *State Government and Administration in the United States* (1936), Ch. XIV; A. E. Buck, *The Reorganization of State Governments in the United States* (1938); W. F. Dodd, *State Government* (1928 ed.), Ch. IX; J. A. Fairlie, "Studies on State and Rural Local Government," *Am. Pol. Sci. Rev.* (1933), XXVII, 317-329; W. B. Graves, *American State Government* (1941 ed.), Ch. XII; A. N. Holcombe, *State Government in the United States* (1931 ed.), pp. 339-352, 434-445; Harvey Walker, *Public Administration in the United States* (1937), Ch. III; L. D. White, *Trends in Public Administration* (1933), Ch. XIV, XVI.

was no board of agriculture because land was plentiful and everybody was supposed to know the art of farming, which consisted of clearing the land, sowing, reaping, and then moving on to new and very cheap land when a farm was worn out. Few states did more than endorse education; for each community provided for the teaching of the three *R*'s in its own little school, if it wanted one, and any education beyond that was strictly a private matter and was paid for accordingly. There were no boards of health; for a few doctors scattered about over a commonwealth could "bleed and blister" the sick, and epidemics, since they were commonly regarded as manifestations of the wrath of God, could not be prevented. In those rugged days there were no factory inspectors, no mine rescue commissioners, and no body of any other description which looked after the interests of labor; for the majority of men worked for themselves or on farms, while the few who were employed in the more hazardous industries were deemed to have assumed all risks, and any attempt on the part of the state to protect them would have been considered an interference with their freedom.

Partly from lack of scientific knowledge, but chiefly because the need did not exist, state governments performed very few administrative functions before 1850. Industrialization, urbanization, science, and enlightenment along many lines have changed all this. The state now serves the public in scores of ways which were undreamed of by our agricultural civilization a hundred years ago, and it administers a few functions which were considered entirely outside the province of government twenty-five years ago. Administrative departments, boards, and commissions have been created by the dozens to take care of these services. The cost of operating the purely governmental organs of the state is not one tenth as much as the cost of maintaining the various public services. More than two thirds of all the state funds go to education, highways, and social security.

Creation of administrative agencies. The only state administrative officers a hundred fifty years ago were the governor, lieutenant governor, secretary of state, attorney general, treasurer, and auditor. These were briefly discussed in Chapter 12. They were created by constitutional provision and remain constitutional officers. As the work of general administration grew, and in particular as the states seriously began to take on service functions, such as education, the construction and maintenance of highways, and the regulation of public utilities, new officers and agencies were created. About 1915 there were but a few states which could not boast of thirty or forty administrative organs, while some reached the hundred mark, and several multiplied this by two, producing a veritable administrative wilderness. Two important differences are to be noted between the establishment of state and national administrative agencies. First, many officers, boards, and commissions are prescribed by the state constitutions, while the national administrative machinery is left entirely

to congressional discretion. In the second place, although Congress has created a large number and several varieties of administrative agencies, it has made more successful efforts to keep them within the regular executive departments than have the states. State legislatures have shown a decided preference for boards and commissions. Each new need in the states has usually been met by the creation of a new and practically independent administrative unit, even though the necessary machinery already existed. Consequently, there is much more duplication, overlapping, and general confusion in many state systems than there is in the national system.

The need for administrative reorganization. It has been shown that the national government felt the necessity of studying its administrative system with a view to reorganizing it along more satisfactory lines. The states, for the most part, have felt this need with even greater urgency. About 1912, influenced perhaps by the investigations and recommendations made respecting national administration by President Taft's Efficiency and Economy Commission, several states started to look into their administrative households. In Illinois, they found inefficiency and waste resulting from a lack of correlation and co-operation among the offices engaged in similar or related functions; separate boards for each state penal institution and normal school; some six boards dealing with agricultural matters, and about three times as many labor agencies; finance administration distributed among a number of elective and appointive officers, with no one carrying general responsibility; only a nominal power of supervision in the hands of the governor, which he could exercise only through his power of appointment and removal; and so many separate offices that the governor could hardly direct them even if he had adequate powers.² Conditions in New York, Massachusetts, Iowa, and some other states were found to be very similar to those in Illinois.

WHAT THE EXPERTS RECOMMENDED. The various commissions of investigation, and, in particular, many careful students of administration, a number of whom served on the commissions, made recommendations which are here summarized. (1) All the agencies performing a major function should be consolidated into a single department, each department to be subdivided into as many bureaus and services as necessary. (2) Each department head should be appointed and removed by the governor and be held responsible to the governor for the operation of the department and all its subdivisions; and in order that the department head might control these subdivisions, he should be given the same authority over his chief assistants as the governor is given over him. (3) The experts recommended a governor's cabinet, to serve the same general purposes as the President's Cabinet, and to be composed, as is the latter, of the heads of departments. (4) They proposed a discontinuance of the

² J. M. Mathews, "Administrative Reorganization in Illinois," *National Municipal Review* (1920), Vol. IX, No. 11. (Supplement), p. 742.

use of boards or commissions for work of administrative character, endorsing at the same time, however, the principle that such agencies should be used for the performance of whatever quasi-legislative, quasi-judicial, advisory, or inspectional functions the departments might have.³

The progress of reorganization. The fact that a particular system is generally recommended by experts does not secure its acceptance by state legislatures. Opposition to the plan is on very much the same ground as congressional opposition to a reorganization of the national administration. Then there is an additional obstacle to reorganization in some states—it cannot be effected except by constitutional amendment. Nevertheless, some progress has been made. Even before the comprehensive surveys by committees of experts had pitilessly exposed the weaknesses of state administrative organization, a few states had consolidated certain administrative functions.

MINOR READJUSTMENTS. Rearrangement of administrative agencies which hardly belongs in the class of administrative reorganization has been undertaken in a few states. The New Jersey legislature in 1915 and years following assembled many services into several departments. The general plan was to place a department under the control of a board, leaving the board the authority to appoint an executive officer. The terms of board members were usually made long and overlapping. Consequently, a governor has little hope of controlling a majority of a board. Yet, sitting as a member of a number of the powerful boards, the governor is able to make his influence felt and to serve as an integrating force in the administration.

In 1921 Michigan created five new departments, placing many existing agencies in those departments, and set up an administrative board with the governor as chairman. A number of elective state officers sit on this board, thus leaving the governor in a position which can not be described as that of chief administrator.⁴ Other states which have made only piecemeal adjustments in recent years include North Carolina, Maine, and Wisconsin.

MORE COMPREHENSIVE PLANS. A number of states, of which Illinois, Nebraska, Washington, and Pennsylvania are examples, have undertaken more ambitious programs of reorganization. Owing to the elaborate provisions of state constitutions, a complete reorganization plan ordinarily calls for a constitutional amendment, but nearly all of these states have used the statutory method. The Illinois legislature, through its administrative code, adopted in 1917 and supplemented by later acts, brought some sixty administrative units into ten departments, each headed by a single director appointed by the governor with the consent of the senate (in practice the consent is little more than a formality) and removed by

³ See Holcombe's summary, *op. cit.*, pp. 341-342.

⁴ Bromage, *op. cit.*, pp. 353-355.

the governor practically at will. Individually, the directors are responsible to the governor for their departments; collectively, they serve as the governor's cabinet. The different functions of each department are administered by superintendents, bureau chiefs, or similarly titled assistants, who are responsible to the director, although appointed, like himself, by the governor and the senate. For those services which require the exercise of considerable quasi-legislative or quasi-judicial power, paid boards are attached to the appropriate departments.

An important feature of the system is found in the finance department, through which the governor is enabled to exercise a substantial control of activities in the other departments. Among other things, this department prepares the annual budget, examines and approves or disapproves vouchers and bills of the several departments, and ascertains whether the prices paid for labor and materials are fair, just, and reasonable.

New York, under the leadership of Governor Alfred E. Smith, adopted a plan of reorganization which placed the governor in very definite control of administration. Under the provisions of a constitutional amendment, approved in 1925, the legislature, with due regard for functional relationships, placed nearly two hundred administrative agencies in eighteen departments. Only the governor, lieutenant governor, comptroller, and attorney general remain elective officers. The governor, from his position as head of the "executive department" (one of the eighteen departments), through his powers of appointment and removal, and through his cabinet conferences, has responsibility and authority sufficient to enable him to function as the chief administrator of the Empire State.⁵ Tennessee centered administrative powers in the office of governor two years before New York adopted the Smith plan. Still another state which has tied practically all the lines of administration in the executive chamber is Virginia. Notwithstanding the fact that the movement was led in that State by a Jeffersonian Democrat, Governor Harry F. Byrd, the degree of integration achieved would scandalize the Sage of Monticello.⁶ On the whole, it must be said that state administrative reorganization has made only fair progress. Many public men and a few experts fear the concentration of authority in the hands of the governor more than they deplore the probable waste and inefficiency of diffuse administration. After all, the plan of organization is only one important element in administration. Good government has been secured under widely varying plans.⁷

⁵ F. D. Roosevelt, "Results in New York . . .," *National Municipal Review* (1930), XIX, 224.

⁶ Bromage, *op. cit.*, p. 350.

⁷ A number of authorities are skeptical of reorganization plans and of accomplishments under these plans. See, for example, F. W. Coker, "Dogmas of Administrative Reform," *Am. Pol. Sci. Rev.*, XVI, 399 (1922); W. H. Edwards, "Has State Reorganization Succeeded?" *State Government*, October, 1938, pp. 183 ff; and Harvey Walker, "Theory and Practice in State Administrative Reorganization," *National Municipal Review*, April, 1930, pp. 249 ff.

Control of state administration. Theoretically, the governor is the supervisor of state administration, the chief executive. The fact coincides fairly well with the theory in those states which have something approaching an integrated administrative system; but in the greater number of states, the governor's powers are quite inadequate. There are administrative officers elected by the people, just as he is, and the chief executive has little control over them. The governor's power of appointment and removal in respect to the other administrative officers is limited, often severely limited. In directing administration, the governor frequently finds himself almost helpless because of the large number of scattered services he is supposed to direct. Again, he may find that the officers are regulated in such detail by statutes that little discretion is left to him as chief administrator. Without going into further detail concerning the governor's difficulties in attempting to command the administrative forces in the typical state, we may say that his task borders on the impossible.

Except in some eighteen states which have given the chief executive substantial supervising powers, administration is controlled by the legislature through commissions or through statutes prescribing the minutiae of administration, usually by a combination of the two methods. Since the legislature assumes the functions of a meticulous board of directors, the governor's only hope of having a large part in administration lies in securing control of the legislature. Sometimes, he is successful; but success rests upon his place as party leader, his personality, and other political and personal factors. At best, his control of the legislature is uncertain, and it never gives him a direct day-to-day management of administration, which is the thing most needed.

Departmental organization. Departmental organization differs a great deal in the several states. The simplest type of organization is found in those states which have an integrated administrative system. The ten departments under the administrative code in Illinois are Finance, Public Works and Buildings, Agriculture, Public Welfare, Conservation, Labor, Mines and Minerals, Public Health, Insurance, and Registration and Education. Each department contains a group of related services. For example, in the Department of Labor we find divisions of factory inspection, employment agencies, and minimum wages. Outside of the ten departments, as already indicated, are the old constitutional and elective officers—secretary of state, treasurer, etc.—and twenty or so other administrative agencies which for one reason or another have not been brought within the provisions of the administrative code. Illinois and the ten or twelve states which have a somewhat similar plan have a system of departmental organization rather closely resembling that of the national government. A few states, New York and Virginia in particular, have

highly departmentalized administrative systems, leaving very few agencies scattered here and there.

Disorganization, rather than organization, characterizes the organs of administration in the greater number of other states. They have more elective officers, officials practically independent of the governor, than have the states just described. They have scores of boards and commissions, many appointed by the governor, some appointed by other officers, and some elective. A few services are headed by individual officials; but the board system is prevalent, with scant regard to whether or not the service calls for this sort of direction. The kindred services are not ordinarily grouped into a department; each unit is a department in itself. The head or heads of units are usually made responsible to the governor; but this cannot be made effective because of the weakness of his power of appointment and removal, the lack of adequate power of direction, and the large number of separate units. Some agencies are not even responsible in theory to the governor but are under the supervision of some other elective officer, or even a board.⁸

II. COUNTY ADMINISTRATIVE ORGANIZATION ⁹

The states dependent upon local administrative units. The states do not attempt to set up administrative bodies sufficient to carry out all of their functions. To a considerable extent they rely upon local units of government and local officers, particularly upon counties and their officers. Your birth certificate is required by state law, but it is issued by a local office, probably a county office. State law requires a hunting license, a car license, a marriage license, but we go to the county court house to get them. State law regulates land transfers, wills, and divorces, but the counties take care of the administrative details. State law fixes certain standards for milk and other products on the market, but the county and city officers have the burden of enforcing these standards. The state establishes a minimum requirement for public education, but the county and city authorities are charged with the responsibility of enforcing them. Commit a crime (against the state), and you are arrested by a county or city officer, prosecuted by a county officer, before a judge elected by the county, and hear the verdict from a county jury. If found guilty, you may be sent to the *state* penitentiary. This could be continued to mo-

⁸ See Graves, *op. cit.*, pp. 426, 428, 430 (facing), and 432 (facing), for instruction charts, tables, and maps on state administrative reorganization.

⁹ R. C. Atkinson, *Principles of a Model County Government* (National Municipal Review, supplement, Sept., 1933); A. W. Bromage, *American County Government* (1933); Dodd, *op. cit.*, Chs. XIII-XVI; J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930), Chs. IV-IX, XII, XX-XXII; *National Municipal Review*, February, 1939 (County Government Number); Wylie Kilpatrick, *Problems in Contemporary County Government* (1930).

notony. It is true that counties and cities, particularly the latter, have a number of local functions to perform, but a very significant phase of local government is that of serving the state in an administrative capacity.

Legal status of counties. "While the county is an agency of the state, it is likewise a creature of the state."¹⁰ It is created by the state, at all times subject to its control, and may be abolished by it. This plenary power over counties was in earlier times held almost exclusively by the legislature; but it was not so long until some of the states started the practice of protecting counties from legislatures through constitutional provisions prohibiting the changing of boundaries, the moving of the county seat, and the like, without the assent of the people affected.

County officers. The county has no clear separation of powers along the traditional executive, legislative, and judicial lines. It has no chief executive; and a number of its officers, subject to no unified control, perform functions which are both judicial and administrative.

1. **THE BOARD.** The most important governing body in the county is the elective county board (known also by various other names), which functions in every state except Rhode Island, although neither the board nor the county as a unit of government is of any particular importance in the New England states. Boards vary in size from three to as high as fifty members. They meet as actual needs and laws require, both of which vary among the states and counties within the same states. In some jurisdictions, the boards, during the time they are not in session, make a great deal of use of committees. Board members are ordinarily paid on a per diem basis, although in a few large counties of some states fairly substantial salaries are provided. These bodies have no powers other than those allowed by the constitution and legislature of the state. In general, they are empowered to control county finances, subject to restrictions as to the amount of taxes which may be levied and the purposes for which such taxes may be used and to like restrictions as to borrowing money; to construct county roads and bridges; to erect and maintain courthouses, jails, and other county buildings; to license and regulate dance halls, bathing beaches, and other places of recreation and amusement; to legislate on local matters (in a few states); to organize townships; to appoint a few officers, such as the county physician; to exercise a measure of supervision over the elective officers; to establish polling places and administer certain other features of the election laws; and to establish and maintain institutions for the care of the needy and, subject to national and state law, to make certain decisions on questions of social security administration.

2. **OFFICERS ASSOCIATED WITH THE ADMINISTRATION OF JUSTICE.** In all counties there are a number of officers whose chief function is the administration of justice. The more important ones are the sheriff, the coroner

¹⁰ *Cook County v. Chicago*, 142 N.E. (Ill.) 512 (1924).

or some one officer acting in that capacity, the prosecuting attorney, the clerk of the court, the justices of the peace, and constables. They have been sufficiently discussed, for our purposes, in the chapter on "The State Judicial System."

3. FINANCE OFFICERS. Several officers of the county are concerned with important matters of finance. The *assessor* is a familiar figure who goes from house to house fixing the value of personal and real property for purposes of state and local taxation. Commonly chosen by the people, the assessor is not always a man who knows how to evaluate property; nor is he always able to resist the tempting inducements held out to him by those who seek the favor of low assessments. In a few states assessors are appointed by state authorities, but this involves a degree of trust in appointing officers that many people do not share. A more satisfactory plan of securing good assessors and one which is used in a few jurisdictions is found in the requirement that candidates shall pass an examination testing their fitness to be assessors before their names are placed upon the ballots. Assistants to assessors are ordinarily provided by appointment, and in some cities, notably New York and Baltimore, such assistants must demonstrate their qualifications by examination before receiving appointments. Assessment is not always a county matter. In a number of states, assessors are township or district officers whose work is subject to review by some county authority.¹¹

The county *treasurer*, like the assessor, is commonly elective. It is his duty to receive, deposit in banks, and disburse the county funds in accordance with the laws, which are usually so explicit that there is little discretion left for the treasurer. Not so long ago it was quite common for the treasurer to receive for his own pocket the interest—sometimes a large amount—on county funds deposited in banks. This is now generally prohibited by law. Treasurers very commonly receive substantial salaries or even more substantial compensation in fees. Many scandals and shady transactions have been revealed in connection with the depositing of county funds. Banks have taken care of the treasurer's bond in return for the deposits; banks of political friends have been favored, even to the extent of being given deposits when known to be unsound. A number of states have sought to remedy these conditions by giving the county board the authority to select the depositaries, although a board as well as a treasurer might sometimes get off the straight and narrow path. In addition to his work for the county, the treasurer ordinarily acts as an agent for the collection of state funds, and in some states he receives and passes on to local units of the county the moneys designated for them. A few states have a county officer known as the *tax collector*; in some others, the

¹¹ State bodies in about forty states assess railroads and other special properties. In about thirty states, state boards of equalization may review local assessments of other property.

assessor or sheriff does the collecting; in the majority, the treasurer acts in that capacity, and very properly so.

The *auditor* is a county finance officer found in some sixteen of the states. His duties consist primarily of examining and approving bills and claims against the county. Following his favorable action, the county board ordinarily orders payment. Where there is no auditor, the county clerk serves in somewhat the same capacity. Indeed, except perhaps in the very populous counties, there is no need for both auditor and clerk.

4. OTHER OFFICERS. Some twenty-five states have the office of county *clerk*, usually elective. The clerk keeps the records of the proceedings of the county board; prepares and distributes ballots for elections; issues certain licenses; makes reports as required by law; and performs numerous other ministerial and clerical tasks which vary considerably from state to state. Where there is no county clerk, these duties are discharged by the clerk of a court or other officer or officers.

A *register of deeds* is about as common in the counties as the county clerk. His chief duty is to keep the public records of the sale and transfer of real estate. This is an important function in a country where real property changes hands so frequently; and in those states which have no registers of deeds, some other county officer, usually the clerk, keeps these records. There are many other county officers—school, road, charity, etc.,—varying in number, titles, and duties among the states and even among the counties of a particular state. The elective officers mentioned above are able to carry out the administrative work of the ordinary county; but in the more populous areas, hundreds or even thousands of assistants, deputies, and clerks are employed. In a few counties such assistants are engaged under the merit system.¹²

Subdivisions of the county: 1. THE TOWN. For purposes of community government, counties are subdivided in one way or another in every state. In the New England states this subdivision is the town, a unit which dates from early colonial times. In these states it is an older and much more important unit of government than the county. The term "town" has various meanings in different parts of the country and often several meanings in the same locality. The farmer says, "I am going to town," meaning to the little cluster of houses and stores, the village. The boy in the village says, "I am going up town," meaning that he is going a quarter of a mile to the point where the village trading is done. It is difficult for many Americans to understand that the New England town is a rural area averaging about twenty-five square miles, which usually includes a village. In theory, the town is governed by the whole body of citizens, who assemble at the town meetings, make the local laws, and elect a clerk and other town officials to carry out these laws and the many duties imposed by state authorities. This is not far from the fact in those communities which are,

¹² See Ch. 20, sec. III.

still chiefly agricultural and consequently not overburdened with population. But in industrial areas with more than 10,000 or 15,000 inhabitants, many of whom are non-native or floaters, the system breaks down and most likely falls into the hands of a machine. Ordinarily, city government is more competent for administering the affairs of the more populous communities, and that form is usually adopted when the town system becomes too unwieldy. The town or township system was adopted by a number of states; but only in the Central states is there much resemblance to the New England system. Even in these states, the town is of much less importance than in New England. This is true because in the Middle West the town is subordinate to the county; because roads, schools, and some other local functions are usually administered by separate authorities; and because the town includes the rural population only, the village having a government distinct from that of the town.

2. COUNTY DISTRICTS. In the Southern and Western states, counties are divided into administrative units known variously as magisterial districts, civil districts, and precincts. Ordinarily villages, and sometimes the smaller cities located within the district, are parts of the district organization. Such districts are convenient areas for the conduct of elections and the administration of petty justice, schools, and rural roads. An important characteristic of these districts is their almost complete subordination to the county. They were created for administrative purposes and their authority is exceedingly limited. Neither in the South, because of its earlier development along county lines, nor in the West, because of its wide, sparsely settled areas, has there been developed anything approximating the vigorous local government of the rural New England town.

3. SPECIAL DISTRICTS. The regular county districts, particularly in the South and West, have not been found equal to the performance of a number of administrative functions. Consequently, special districts have been created for schools, highways, drainage, irrigation, and the like. Professor F. H. Guild has found forty-seven varieties of such districts under eighty-nine different titles.¹³ Special districts may or may not have boundaries conforming to those of a county, regular district, or township. Their boundaries are determined by the area of need, not by the arbitrary lines of some pre-existing political unit. They have another advantage over the regular districts in that they are created to administer special functions—health, mosquito abatement, and so on. Still another advantage is in finance. Counties and the regular districts are commonly limited by law in the amount of taxes they may levy and the money they may borrow;

¹³ See reference to Guild's articles in Fairlie and Kneier, *op. cit.*, p. 477. In 1936 Professor William Anderson placed the number of special districts at 8,580. Six years later his figure was 8,382, distributed as follows: water control, 2,911; rural road and bridge, 1,688; irrigation and conservation, 712; urban improvement, 227; urban utility, 702; housing, 525; soil conservation, 107; miscellaneous, 1,510. *The Units of Government in the United States* (1942 ed.), p. 6.

but, by creating a special district, it is ordinarily possible to get funds sufficient for a given purpose. We might add that this circumvention is not always appreciated by the taxpayers. Officers of the special districts are appointed by county or state authorities in a number of instances, although the popular election is the usual method. Some effort is made in a few states to guarantee that the appointed officials shall be qualified for the positions they hold; but there are few cases in which the requirement goes beyond the "suitable and competent person" generality. It is obvious that several local government districts, sometimes coextensive and sometimes overlapping, with their special functions, and frequently with independent taxing powers, cause considerable confusion and waste. The problem here, as with the state administrative system, is one of coordination and consolidation, a problem which in rural areas has hardly been touched.

State control of local officers: 1. JUDICIAL CONTROL. Since counties and their subdivisions are concerned so largely with the administration of state laws, it is highly desirable that state officials be authorized to exercise some control over local officers. A degree of control is exercised by the courts, which, for example, by writ of mandamus may compel a county board to levy a tax to pay the amounts due on county bonds and by writ of injunction may restrain county officers from illegally changing the county seat or creating a debt in excess of that authorized by law. Courts are frequently empowered to remove local officers for corruption, incompetence, and similar causes; and in a few states, judges have the duty of appointing certain county officers. But court control over officers corrects only the worst abuses and mistakes, and it is highly technical and cumbersome in any case.

2. ADMINISTRATIVE CONTROL. Any effective control or supervision over local officers must come from the central administrative authorities, as France and other countries of Continental Europe learned long ago. Control of our local officials, as far as such control was exercised at all, has been very largely in the hands of legislatures during the greater part of our history. This was the old English system, now considerably modified in favor of administrative control in that country and to a somewhat lesser extent in the American states. Administrative control in America takes several general forms. (1) Appointment of a few local officers is by state authorities. For example, the justice of the peace is appointed by the governor in several states. (2) State authorities may fix the standard of attainment for certain employees who are selected by local authorities, as illustrated by the state standards set for teachers who are appointed by local boards and superintendents. (3) State officers may remove certain local officers in some states. The most conspicuous exercise of this authority in recent years occurred in New York in 1932, when Governor Roosevelt removed the Sheriff of New York County. (4) Local authorities

may be required to make reports to state authorities. State officers may also have the power to inspect and advise, and, on occasion, command, local officers. (5) Payment of subsidies by the state to local communities for roads, schools, and other purposes, provided the communities meet standards fixed by the state, is a fairly effective scheme of central control. This type of control is being noticeably extended just now, the states having had to come to the aid of local communities in education, relief of unemployment, and other activities. (6) State authorities may also control through the review of local action. Examples of this are furnished in the approval of local health regulations by the state department of health and the adjustment of local tax assessments by state boards of equalization.¹⁴ While such powers may seem comprehensive, it must be remembered that the greater number of them apply only to particular matters in particular states. Students of administration generally hold that there is only a fair control of local authorities by state administrative officers and that there is too much effort on the part of legislatures to regulate the work of local officers by detailed statutory provisions.

Criticisms and proposals. For one hundred fifty years the American county has stood practically as it stands today. It was organized in colonial times to suit the needs of rural America and the states later admitted to the Union came with their counties organized to serve the needs of their rural civilization. The county still functions with some degree of success in rural areas, but it seldom achieves any note-worthy triumphs in urban communities. In small or sparsely populated rural counties the per capita cost of administration is usually high and in the metropolitan areas the county administrative system is often corrupt and almost always ineffective in dealing with the many technical activities it is supposed to assume. The stronghold of the spoilsman, with an organization which in truth belongs to the "ox cart" days, the county does not hold a place as a promising unit of government. Furthermore, the counties have fallen into financial difficulties and they have called loudly to the states for financial aid, bewailing at the same time their gradual loss of the power of self-government. In addition to these and many other criticisms of county government, we have the problem of special areas mentioned above.

What solutions are offered? Abolish the counties; establish five or six or a dozen administrative areas in each state, is the answer efficiency men sometimes give. They say that the counties are much smaller than necessary in this day of rapid communication and transportation and they show how money can be saved and services more efficiently performed by the larger units of administration. There is just one difficulty about carrying this proposal into execution—the people will not adopt it. It is proper also to raise the question of the desirability of such a plan. Would not democracy lose by this scrapping of the county? Rural democracy

¹⁴ Fairlie and Kneier, *op. cit.*, pp. 92-104.

certainly would receive a blow. The economy of the proposal is readily admitted, but the price of going to the bargain basement for a governmental structure might prove to be a loss in civic consciousness.

Retain the county system, but consolidate the counties to half their number, say some authorities. This is a perfectly sound proposal. Certainly there is no reason why an individual can not travel forty miles to a county seat today if he could travel twenty miles to one fifty years ago. But the rural counties will not consolidate. The inhabitants of the county seat will vote against it to a man and so will all the other citizens of the county who feel that they might suffer some slight inconvenience. But the chief factor which will defeat such a proposal is the vague fear that this movement is but the beginning of a scheme to rob the counties of all power, a fear fed by all of the county politicians who for obvious reasons are opposed to consolidation. So great is the opposition to consolidation that it has been found difficult or impossible to place an amendment in a state constitution which would *permit*, not require, the people of counties to vote on the question.

Another type of consolidation which has been proposed and which has met with a little favor is the city-county combination. This will be discussed in the next section of this chapter.

There is another type of consolidation, the consolidation of functions. For example, small and poor counties might combine for the purpose of maintaining a county hospital or a health unit or some other service. This is hardly as satisfactory as a complete consolidation, but it has some merit and it has been achieved in a few cases.

Considerable attention has been devoted to the problem of improving county administration by the introduction of some sort of executive management. There are those who believe that the county should adopt a manager system similar to the city-manager plan.¹⁵ Although this plan has been advocated for some years and a few states have authorized its adoption, the number of counties that have installed it is relatively small. It seems that the counties are more reluctant to accept a new system than the cities. Besides, the functions of the county and the city are not the same. The city has many services which correspond rather closely to those of a business organization; the county has few.

Perhaps Professor William Anderson is right in fixing his aim on the 165,049 units of government.¹⁶ Fully realizing that his plan to abolish nine out of ten of these units will in all probability never be accepted, he nevertheless presents it as a desirable goal. He would abolish the 118,308 school districts, leaving the schools to be administered by city or county authority, but under state control. In like manner he would abolish practically all of the special districts. His blue prints call for the disap-

¹⁵ See *National Municipal Review* (1936), XXV, No. 10.

¹⁶ *Op. cit.*, pp. 45-47.

pearance of the townships except in New England, where rural towns would be consolidated. The small villages he would deprive of their corporate existence. He would create city-counties in every area having a city of at least 50,000 population, giving such units of government the functions of the city, the county, and the school district. For rural areas he would leave the counties to administer state-wide services such as schools, health, and welfare and he would leave with these counties any purely rural functions. Of course he advocates extensive consolidation for rural counties.

There are, then, many suggestions and plans for the improvement of county government and very few of them have met with any enthusiasm from county and state officers or from the people. Counties continue for the most part to manage their affairs badly. They make increasing demands on the states for financial aid, while they proclaim, "never before has it been so necessary for counties to stand together in the preservation of local autonomy." Obviously it is not possible to receive funds from the state without at the same time giving the state a larger share in the administration of the services for which funds are advanced. During the past ten years the trend toward state control of highways, education, public welfare, and health administration has been observed even by those who give these matters little attention. This is inevitable. The states have the broader taxing powers, they have the technical staffs necessary for administration, and they are therefore better able to administer large functions. The counties should retain their purely local functions, but science and technology have made many local functions statewide functions. The county may not be doomed but it is certain to play a decreasing part in the scheme of government.

III. CITY GOVERNMENTAL ORGANIZATION ¹⁷

A. The City and the State

It is not the purpose of the author to trace here the growth of the American city, our change from an agricultural civilization to one predominantly industrial and urban. Nor is it possible to review the interesting if not always inspiring story of the development of the American city as an agency of government. Many other writers have dealt with these subjects and to them the student is referred. All that is attempted here is a brief discussion of the city's governmental structure.

The city to a lesser extent than the county discharges certain functions for the state and to a much greater extent than the county administers to

¹⁷ E. S. Griffith, *Current Municipal Problems* (1933); C. M. Kneier, *City Government in the United States* (1934); A. F. Macdonald, *American City Government and Administration* (1941 ed.); W. B. Munro, *Municipal Administration* (1934); J. M. Pfiffner, *Municipal Administration* (1940); C. E. Ridley and O. F. Nolting, *The City-Manager Profession* (1934); C. P. Taft, *City Management: The Cincinnati Experiment* (1933).

local needs. Like the county, the city is a creature of the state. It was formerly the creature of the state legislature; but since the legislature often used its exclusive powers unwisely, constitutional restrictions were placed upon its authority over cities. These restrictions are now numerous and vary a great deal among the several states; but, in general, they are limitations on the authority of the legislature to do such things as grant charters to cities by special act, amend charters without the consent of the inhabitants of cities affected, and authorize cities to tax and borrow money beyond a stipulated percentage of the valuation of taxable property. It may be said that, although in theory the city is in essentially the same position of dependence upon the state as is the county, in actual fact the city is more independent than the county because of the constitutional limitations upon the legislature respecting its control of city affairs.

The city charter. Each city has a charter, a sort of constitution. It is acquired in various ways. In some states, the legislature may still grant each city a charter by a special act and each charter may be different. This gives the legislature and the cities too much of an opportunity to play politics. Some states have tried the expedient of requiring the legislatures to classify cities and give all in the same class the same charter. The trouble here is that cities may be so classified, as they were at one time in Ohio, that practically every city will be in a class to itself, and the special charter system will again prevail. A few states have a set of charters, allowing a city to adopt the one best suited to its needs. This is known as the "optional charter" system. Although it appears satisfactory, cities have often failed to find charters to meet their specifications. Some years ago students of municipal problems pinned their faith on the home-rule charter as the solution of many of the city's ills. It is now authorized in sixteen or more states which include many of the largest cities.¹⁸ A small group of citizens, chosen by the voters or otherwise, drafts the charter for a city. It is then referred to the voters, whose approval puts it into effect, although in some states it must go through the formality of receiving legislative approval. The home-rule charter must not, of course, contain provisions contrary to the Constitution, statutes, or treaties of the United States, or to the constitution of the state, or to state laws. The home-rule principle is therefore subject to considerable modification.

ITS CONTENT. By whatever method the charter may be acquired, it provides for the government of the city and the conduct of business, usually in great detail. It creates the municipal corporation (the city as a legal entity); provides for the framework of government; names the officials, the manner in which they shall be chosen, the length of their terms, and similar details; outlines the powers of the corporation and of its vari-

¹⁸ See the series of articles on "What Municipal Home Rule Means Today," *National Municipal Review*, 1932. J. D. McGoldrick, in his *Law and Practice of Municipal Home Rule* (1933), seems to think that the home-rule idea has been something of a fad which is now fading out.

ous officers; prescribes the method for letting contracts; lays down the rules to be observed in city finance; elaborates a municipal employment system; and makes detailed stipulations on scores of other subjects. The charter of any one of several of the larger cities fills a sizable volume. An important point to be noted is that the city has no powers except those delegated by state authority and found chiefly in the charter. Unlike the powers delegated to the national government in the Federal Constitution, which are construed liberally by the federal courts, powers enumerated in the city charter are construed strictly by state judicial authority.

State control. Cities are controlled by the state, although the amount of state "interference and obstruction" in city affairs varies in accordance with constitutional provisions affecting local government, the nature of the city charters, the composition of legislatures, and the attitude of the courts. This state control was formerly exercised almost exclusively by the legislatures and it is still very largely in the hands of those bodies. Not only must the city look to the legislature for its authority, but also, in a number of states, it must go to a legislature in which the rural communities have a majority of the representatives, although they have less than a majority of the population. This unequal representation exists because the rural areas once had a large majority of the population and because their representatives, using their initial advantage, have refused to grant the cities their fair quota of representatives. This struggle of the city against the legislature is nowhere better illustrated than in Illinois. In that state the legislature has failed, since 1901, to perform its constitutional obligation of legislative reapportionment. The city of Chicago bitterly protests against this discrimination and it frequently raises the complaint that the legislature will not grant it the authority necessary to conduct its local affairs. In 1925 the Chicago Council unanimously passed a resolution of session from the state! This bizarre gesture is indicative of the city reaction against rural-state domination. It may be that we shall come to the city-state plan in time. This plan would be vigorously opposed by the "down-staters" or "up-staters" because the removal of the city from the state would mean an immense loss of revenue to the latter.

Legislative control of cities may not always mean unfriendly control but it commonly means inflexible control. Laws are made applicable to all cities, or to cities in certain classes, without allowance for the special requirements of particular cities. Yet, if we are to have legislative control, it seems best to exercise it in this manner, for legislative acts for individual cities would produce a train of abuses as they did before special legislation was prohibited.

But there is another type of control, administrative control, which is used extensively in European countries and which is growing in our own. The French, the Germans, and, to a lesser extent, the English grant through their central legislative bodies the very widest powers to local

government units. But they provide also that these local units in exercising these powers shall be under very close administrative supervision imposed by the central administrative authority. The administrative officers in approving or vetoing a city budget or some proposed municipal undertaking are not limited to the consideration of legality, but they may consider the financial standing of the city, the usefulness of the proposed project, the effect on the surrounding community, and any number of other factors. It is clear that the great advantage of administrative control is in its flexibility. It should be equally clear that unless the administrators who exercise this control are well trained, capable, thoroughly honest, and disinterested, the cities will suffer from discriminations and arbitrary acts to a number and degree beyond the capacity of an ordinary state legislature to impose. The European countries have been fairly successful in developing administrators who possess the necessary qualities.

There is not a great deal of state administrative control over cities in the United States, but there is a decided trend in that direction, particularly in the fields of education, health, public welfare, and finance. Since 1919 an Indiana law has authorized ten taxpayers to petition the State Board of Tax Commissioners to review either a local tax levy or a local bond issue proposal. The taxpayers have not failed to exercise the privileges conferred nor has the State Board hesitated to order local authorities to make substantial reductions. North Carolina has taken what is commonly regarded as an extreme step. In 1931 it established a Local Government Commission composed of three state officers *ex officio* and six citizens appointed by the governor. The Commission is authorized to consider local bond issues from such angles as necessity, adequacy, their effect on the tax situation, and the condition of sinking funds. An issue of bonds not approved by the Commission may, however, be made with the approval of the voters. The state authority exercises a close supervision over the investment of sinking funds, and acts as virtual receiver over any unit of government which defaults on its bonds.¹⁹ State grants-in-aid are very common now, and wherever there are such grants there are accompanying arrangements for state supervision. Administrative control of the European type or of the North Carolina type is not likely to find wide acceptance in America, but there is good reason for a more general extension of state administrative control over the local administration of those functions in which the state has an essential interest. The purely local functions, of which there are still a goodly number in urban areas, should not be brought within the state regulatory framework.

Federal-city relations. Prior to 1933, the cities had only a very few direct associations with the federal government. But such relationships took a decided spurt in the depression years. The public works program

¹⁹ J. M. Pfiffner, *Public Administration* (1935), Ch. V, especially pp. 94-97, and his *Municipal Administration* (1940), pp. 121 ff.

of the federal government permitted federal grants to states, *cities*, and other public bodies. Large advances were made to cities for waterworks, sewerage systems, and schools. The money advanced was in gifts and loans in the 30-70 ratio. In 1935 the W.P.A. advanced large sums to cities for the purpose of providing work for employables on relief. On the application of cities the W.P.A. put men to work on athletic fields, parks, streets, and so on. These projects were financed almost entirely by federal funds and administered by federal officers. During the same year, the P.W.A. made grants of 45 per cent of the total amount and loans of 55 per cent for approved local public works. This practice, with modifications, was continued for several years.

The Municipal Debt Adjustment Act (1934), although declared void in 1936, must be mentioned. It provided that an insolvent city might file with a federal court a petition stating its inability to meet its obligations and its desire to make an adjustment with its creditors. If the holders of at least 51 per cent of the bonds approved the petition, the court could order a readjustment of the debt structure subject to the approval of 75 per cent of the bond holders. Another municipal field into which the national government has entered is housing, to be discussed in a later chapter in this volume.

These new federal-city relations do not remove the city from the legal control of the state, but they are none the less significant. This process, if continued, is bound to cause the cities to rely more and more upon the central government and less upon the states. We have here a definite trend toward federal-city agreements and combinations, associations which will weaken the ties between the city and the state. The creation by the Conference of Mayors, in 1936, of a committee of fourteen to deal with federal legislation affecting the cities was not just an incidental matter. It was a recognition by the mayors of the place the federal government, upon their earnest solicitation, is assuming in their affairs.²⁰

B. The Conventional Form of City Government

The form of city government which brought us through the nineteenth century is the mayor-council plan. It is modeled largely after the structure of the national and state governments, emphasizing the separation of legislative and executive powers. Indeed, the cities followed these models even to the extent of establishing bicameral councils, although these have now been abandoned in every city in favor of the single chamber. Following the states again, the cities at first gave their chief executive officers few powers, but the trend for many years has been in the direction of strengthening the position of mayor. Since 1900 the mayor-council plan

²⁰ P. V. Betters and others, *Recent Federal-City Relations* (1936); Macdonald, *op. cit.*, Ch. VIII.

of city government has been challenged, first by the commission plan and later by the city-manager plan. Yet the mayor-council system, the only system our fathers knew, remains the leading municipal government system. More than half of the cities of over 30,000 population still employ it in varying forms. We shall briefly outline the structure of the mayor-council system and indicate the duties of its officers.

The council. The council formerly exercised practically all of the powers of government in the city. It still has a commanding place in some cities, but it has rather steadily lost power to the mayor in the others. It is always elected by the people, most commonly for a two-year term. Usually councilmen are chosen by wards, sometimes at large, and in a few instances by a combination method. Councils vary a great deal in size (not necessarily in accordance with the size of cities); but the tendency is to make them small, fifteen or twenty councilmen being considered sufficient in most cities. A few of the large cities pay councilmen fair salaries; usually they receive very little. Councils meet as often as necessary—weekly or fortnightly meetings being most common. They organize and proceed very much as state legislatures, relying upon standing committees for the greater part of the routine work. The powers of the councils vary with charters and state laws, but every council has some legislative and administrative authority. Councils in general may pass ordinances (legislate) on such subjects as the following: the structure of city government, as far as the charter and general state law leave it unprescribed; street traffic, sanitation, health, fire prevention, and numerous other matters which fall under the broad “police” power of the city; revenue, appropriations, and other problems of city finance, always subject, of course, to limitations imposed by the state; the granting of franchises to street car companies and other public utilities, again under strict limitations prescribed by state law; and the management of city property. On the administrative side, the council has few powers and these are properly declining in number. Councils still make appointments to some offices, but appointments are usually made by the mayor subject to the approval of the council. In a few cities, offices are filled by the mayor alone. However small the council’s legal part in appointments may be, there are many individual members who by devious means and indefatigable efforts secure places for their friends and supporters in the city’s vineyard.

The mayor. The mayor far outshines the council in city government. A century ago he was chiefly a figurehead and the council had the power; but the success of mayors in handling affairs as compared with the councils’ mediocre achievements, and the rapid growth of administrative functions, particularly in the past fifty years, have placed the mayor in the ascendancy in most cities. He is elected by the people; serves a two-year term usually, although the four-year term is growing in favor; receives a substantial salary in the larger cities—not infrequently more than the governor of his

state. While some mayors have been conspicuous playboys, jokes, crooks and frauds, the greater number of them are of higher caliber than councilmen. A few mayors have gone on to high national office; but for one reason or another, mayors commonly do not seek, or at least fail to find, the favor of the voters outside the cities.

HIS POWERS. The mayor is the official head of the city. He handles communications between the city and outside governing authorities, issues proclamations, receives delegations, entertains distinguished visitors, and represents the city in other formal matters. He is the city's chief administrator, being charged with the very broad duty, sometimes without adequate powers, of directing the various administrative units which perform the numerous services for the urban population. As already stated, he usually has a wide appointing power, commonly and sometimes unfortunately shared with the council.

The preparation of a budget was formerly considered a legislative matter, but a number of cities now pass this responsibility to the mayor and other executive officers. The financial program for revenues and expenditures prepared by the mayor and his staff is submitted to the council, which may strike out items and reduce items; but in a growing number of cities, the council is not permitted to vote increases over the mayor's recommendations. This restriction as to increases in the budget is singularly effective in preventing wasteful, "pork barrel" appropriations.

Just as the President and the governor, the mayor may recommend legislation to the co-ordinate governing body, the council, and often bring about its passage through his political influence and through a judicious use of the patronage. Following the national and state practice, the mayor is given the power to veto ordinances of the city council, a power which he uses frequently for good or ill, depending upon his qualifications and temperament. His veto is seldom overridden by the council, a two-thirds majority being commonly required for that purpose.

Growth of city functions. The council, the mayor, a few constables, some volunteer firemen, and perhaps a few other public-spirited individuals, were able to carry on the affairs of a city a hundred years ago; for in those days the city authorities were expected to do little besides pass an occasional ordinance, preserve the peace, keep the streets (often just dirt roads) passable, and make some crude efforts in the direction of sanitation. Now this is all changed. Large cities provide a hundred, or even two hundred services—libraries, schools, museums, playgrounds, bathing beaches, swimming pools, dispensaries, tuberculosis camps, and so on. Services have grown because the cities have grown, because science has made new services possible, and because the people demand them. The annual cost of these functions in any one of our largest cities runs into several hundred million dollars.

Administrative structure. Manifestly, the work of the city can no

longer be performed by the mayor and the council. The council serves as a board of directors, and the mayor is the general manager, or should be. The work is done through an elaborate administrative organization employing, in large cities, thousands of individuals. Functions are distributed among departments—five, ten, twenty, or more—as in the national and state systems. Departments are headed by single officials or boards, the former being preferred for most departments, the latter being used almost invariably for such departments as schools and charities. Some department heads are appointed by the mayor and some are elected, the practice varying among the cities and departments of the same city. Sometimes the mayor can control them and sometimes his authority is only nominal, depending upon the nature of the administrative structure and upon the mayor himself. Within each department there are as many bureaus, divisions, and sections as the several services of a department demand. These subdivisions are headed by officials who are commonly responsible to their immediate superiors. In a well-organized system the lines of responsibility run from subordinate to superior until they all finally reach the mayor, who is in a general way responsible to the people.

C. Newer Forms of City Government

Undisturbed for a century and a half was the American's devotion to the check and balance theory of government. The division of authority between executive and legislative branches, with all of its bickerings, recriminations, deadlocks, and stalemates, he regarded as the Palladium of his liberties. Even the "practical, hard-headed" business man pinned his political salvation to it, and many of them who scorn the systems of advertising in vogue a generation ago still glow with satisfaction at the mention of this check and balance device of the Fathers. Possibly the mayor-council division in the cities would have continued unchallenged to this day but for two catastrophes. One befell the city of Galveston and brought forth the Commission plan of city government and the other befell the city of Dayton and in turn brought forth the Manager plan. To be sure, both plans had been used earlier in other cities, but the dramatic introduction of these new devices in these cities gave them popularity.

The Commission plan: LAUNCHED AT GALVESTON. In the late summer of 1900 a huge tidal wave, driven by a wind of terrific velocity, drowned some seven thousand citizens of Galveston and destroyed property to the value of millions. For years the government of that city had stood as a match in corruption and inefficiency for any municipal government in America. The tidal wave did not wash it away, but it did result in its displacement. Continuing their old course and grossly negligent in dealing with the emergency, the city government found a number of its functions taken over by the Deepwater Commission, previously formed to

promote harbor interests. This Commission asked a few of the city's leading lawyers to draft a new charter. Their charter, approved by the legislature, provided for a government by a commission of five, to whom was delegated all municipal authority. The best citizens were willing to present themselves to the electorate for the office of commissioner and they were elected. The old political organization went into hiding. Soon the city was a model in public improvements and in financial management. Special reporters were sent to Galveston; magazine articles were written about it; and the Galveston Plan became the talk of reformers and serious students of public affairs the country over.

What was the Galveston Plan? It was a plan very similar to those used in the boroughs of colonial America and in Sacramento, New Orleans, and a few other cities shortly after the Civil War. It provided that all legislative, executive, and administrative power should be vested in a single commission of five men. One of the commissioners was designated Mayor-President, but "Mr. Mayor-President" was simply the chairman of the Commission neither enjoying the honors nor carrying the duties commonly associated with either side of his rather pretentious title. As a group, the commissioners passed ordinances and performed all other duties which related to general policy. As individuals, each supervised the work of a city department, the actual administration of the departments being left to an officer with the proper technical qualifications. Here was in operation a plan of city government, enthusiastically acclaimed, which boldly set aside the traditional separation of powers.

THE DES MOINES REFINEMENTS. Although the Galveston experiment was admittedly a success, the rank and file of Americans hesitated to advocate it for general use. They were concerned about a five-man government with no "checks and balances," fearful of a government which might proceed quickly to an objective. The plan therefore spread slowly until Des Moines (1907) erected safe-guards against the commission. The Des Moines Plan simply superimposes upon the earlier plan certain democratic institutions already in use—the recall, the initiative, and the referendum. Here were the checks against possible arbitrary authority. The Des Moines Plan spread rapidly, receiving modifications as it spread. During the ten years following the action at Des Moines nearly every state authorized the use of the new system in some form or other and about five hundred cities adopted it. Since 1917 very few cities have installed the commission system. Some cities have gone back to the mayor-council system; a larger number have abandoned the commission plan for the newer manager type of city government. Today the commission system is losing ground, although it is still in use in many small cities and a few larger ones, including Newark, New Orleans, and Portland, Oregon. The reasons for the decline in the popularity of the plan which started with such great promise will be made apparent in the following paragraphs.

ADVANTAGES AND DEFECTS OF THE COMMISSION PLAN. Like every system or plan put forward as the solution of a problem of government, the commission system has revealed its good and bad points. It may be said that the principle of concentration of authority is distinctly good, as far as it goes, but it will presently be shown that there is a defect in this particular concentration. It may also be said that the simplification of city government, one of the main features of the commission plan, is greatly to be desired. There is no longer the large number and bewildering variety of officers—some elected, some appointed; some responsible to one authority, some to another, and some responsible only in a vague sort of way to the people.

Has the commission plan placed better men in office? The answer is very definitely "Yes," for the first few years following its adoption. But after the cities have settled down to normal and the novelty of the plan has worn off, there is some question as to whether the caliber of their commissioners is higher than that of the old mayor-council officers. The new system is adopted as a reform, sometimes as the result of a popular uprising. The moral fervor of this movement results in the city's best being placed at the helm. The typical good citizen thinks that his duty is done. "We have a new form of government now, and everything will be all right," he says. His interest lags. It is impossible for him to retain a civic revival spirit from year to year, even if he considered it necessary, which he does not. The old city politicians begin to come out from their hiding places. They are a bit chastened and say they are for the commission plan of government. They run for office and some of them are elected. Sometimes they get full control of the commission and the old "happy days are here again."

Yet it is generally believed that the commission system has given the cities better government than they had under the conventional plan it succeeded. It has not lowered taxes, an achievement which its too optimistic proponents risked prophesying. However, since the cost of living was rising during the time the plan was flourishing most conspicuously, and since the people demanded more and more services from their governments, the failure to lower taxes is easily understood. As a matter of fact, tax levies were increased in commission-governed cities about as rapidly as they were in other cities. The advantage of the commission plan, if any, lies in the claim that it gives better service for the money, a claim which is subject to dispute but which careful students of government usually sustain with some degree of caution.

If we turn more definitely to the debit side of the ledger, we find several entries made against the commission plan. One is that it is not suited for larger cities. A commission of five, or seven, or nine could not be sufficiently representative of the interests of a great metropolis, nor could its administrative functions be distributed among so few departments of ad-

ministration. A more damaging criticism (for it is one which applies to its operation in cities of any size) is that directed at the failure of the commission system to carry out to its limit the principle of concentration of administrative authority. It does mark an improvement over the ordinary mayor-council system, but it still leaves administrative responsibility in the hands of three, or five, or seven men. The commissioner of public safety may be blocked in his efforts because his plans are overridden by the other members of the commission. To the complaints of the public he replies that they should be carried to his colleagues who have tied his hands. His colleagues may reply that his proposals were unworkable. The city's business will suffer materially while these charges and counter charges are passed back and forth.

Another major defect of the system has been found to be in its requirement that commissioners serve as technical administrators. This was not in the original plan. The Galveston Plan simply provided that the commissioners be supervisors of the several departments, leaving the details and technicalities of administration to chiefs of departments. It soon became the common practice in other cities to require each commissioner to assume the duties of actual administrator of a department. Now it often happens that a commissioner of high caliber would not be competent to administer a department in which scientific and technical knowledge was required. The situation was not improved when many cities took from the commissioners the power to assign members to departments and required candidates for the commission to run for specific administrative posts—finance, health, etc. Men with poor professional qualifications who had been through the form of training the jobs seem to require often presented themselves to the electorate and they were often successful in their campaigns. The difficulty here is that the American has been slow to recognize the value of the professional and the expert in government. He does not understand why the amateur should not take direct charge of administration. He has required the commissioners to attempt to be both amateurs who form policies and professionals who administer policies. Few men can do both. When this became apparent, cities seeking to improve their systems of government turned to the manager plan rather than to the commission plan.²¹

The council-manager plan: ITS ORIGIN. As a tidal wave almost literally washed away the wretched government of Galveston and started the commission government system on its course, so a flood at Dayton, Ohio, cleared out its wasteful and corrupt political hacks and brought the city manager, or council-manager form of government into existence. This statement is subject to some modification, for we have already noted that

²¹ On the commission plan see, C. R. Woodruff (ed.), *City Government by Commission* (1911), and standard texts on municipal government by C. M. Kneier, T. H. Reed, A. F. Macdonald, W. B. Munro, J. M. Pfiffner, and others.

there had been commission governments before the Galveston storm and it must now be said that there were manager plans in operation before the Dayton flood. In 1908, Staunton, a small city in the Shenandoah Valley of Virginia, installed the first city manager plan. Three years later, the Lockport (N.Y.) Board of Trade presented to the legislature a draft of a charter embracing the manager system and asked that cities below 50,000 population be authorized to adopt it. The legislature did not act upon the suggestion, but the "Lockport plan" was widely advertised. The next year (1912) several small cities in North Carolina and South Carolina adopted the city manager plan. While the Lockport plan was receiving wide publicity a committee in Dayton was busy studying charters. It recommended the city manager type of charter. Under the new home rule amendment to the state constitution a city could have a charter of its own selection. Consequently, a large committee was appointed to push the campaign for a popular vote on the manager plan. While the campaign was in progress the flood descended. A few months later, the people voted for the manager plan. No doubt the flood had something to do with the popular vote on the question, but, coming as it did with the movement for the new charter, it probably had more to do with advertising the new city manager plan than with the favorable vote the plan received in Dayton.

ITS GROWTH. The new plan spread rapidly from the time (1913) Dayton adopted it. It has maintained a steady growth to date, having, in 1943, about 475 cities operating under it. In about six cases out of seven the cities adopted a manager charter; in the others they simply installed it by ordinance. The latter procedure is commonly frowned upon because momentary dissatisfaction might lead to the repeal of the ordinance before the plan has had an opportunity to justify itself. Not only have adoptions grown steadily, but the friends of the system have found great encouragement in two other facts. It has been adopted by a number of the larger cities, by about one fifth of those with a population of over 100,000. The second encouraging fact is that it has been abandoned by few cities. The majority of these cities were very small and half of them dropped the plan during the depression when whatever government that happened to be functioning was subject to attacks. Cleveland abandoned it in 1931, but the reasons were primarily political, having little relation to the merits of the manager system. It can be said, then, that the manager-council plan is still spreading and that it has demonstrated its suitability for larger cities, including Cincinnati, Dayton, Oakland, and Rochester. It remains to be tried in the very largest cities.

ITS PRINCIPAL FEATURES. The council-manager form of government is a logical development from the commission form. Indeed, there is considerable evidence to prove that the earliest designers of the manager system thought they were simply improving the existing commission plan.

That improvement was in the concentration of executive authority in the hands of one man. The manager plan, as it was soon developed and as it stands today, passing over certain variations, provides for a small council of three, five, or seven members who are elected at large on a non-partisan ticket. This council has all of the ordinance-making power and it elects and removes the manager. The manager need not be, and usually is not, a resident of the city at the time of his appointment. This is a very fine feature of the plan, for it enables the council to pick the best man available and it makes possible a managership profession. The manager is the chief administrator in every sense of the word. He appoints all administrative officers and employees; he directs their work; and he promotes the industrious and capable and removes the inefficient. This ideal is not always attained, for in some cities a few elective officers remain and in others the council has a share, official or unofficial, in naming administrative officers. The manager is charged with the duty of keeping the council informed of the "state of the city" and of recommending to its consideration such measures as he shall deem necessary and expedient. It is important to add one more point to this paragraph. Nearly all of the cities with the manager plan continue the office of mayor, leaving that official the duty of presiding over the council and the pleasant ceremonial functions which commonly go with the office of mayor. The manager is thus left free for the real work of administration.

MANAGER AND COUNCIL. The council formulates and adopts policies, often upon the recommendation of the manager; the manager's duty is to see that the policies are executed, even if he does not approve of some of them. In some cases the council has paid little attention to the recommendations of the manager and the manager usually interprets this situation to mean that he lacks the council's confidence and resigns. On occasion, the council has interfered with the details of administration. This violates a basic principle of the plan, that the manager be unhampered in directing administration. This interference may indicate a lack of confidence in a manager, but if it is chronic with the council the manager plan will eventually fail.

When the plan is operating on a normal basis the council commonly takes the advice of the manager on administrative matters and frequently follows his lead on questions of policy. This procedure is proper, for the manager is a trained professional giving all of his time to his work and the councilmen are properly amateurs. Yet the council should never become a rubber stamp for the manager, certainly not on questions of policy. On what parks the city should lay out, what zoning ordinances it should enact, what hospitals should be erected, what streets should be opened up, and on other matters relating to plans and projects the council should hear the manager, but the decisions should be based upon the independent judgment of the council, the elected representatives of the people. Under the

mayor-council government the people are represented by both arms of the government. Under the manager-council type they are represented only by the council. It is important, therefore, that under the latter type of government, the council take its responsibilities seriously. If, as sometimes happens, the people look to the manager rather than to the council as the responsible authority on matters of city policy, we are likely to see the beginning of the end of the manager system of government and almost certain to see the end of the career of a particular manager in a given city. The manager should strive with all his might to limit himself to his role of adviser and guide to the council, but he should avoid as he would the plague the rôle of public leader in the formulation and defense of city policy. If he carries the responsibility for both policy and administration, he is the government of the city. He is a political official who has lost his professional status as administrator. The City Managers' Association advises its members to stay behind the scenes on all municipal policies, even to the extent of leaving "to the council the defense of policies which may be criticized."²²

MANAGERSHIP AS A PROFESSION. Despite the fact that some managers have become involved in politics, sometimes because the local situation made it inevitable and sometimes because the managers made the mistake of assuming a political rôle, managership is developing as a profession. This it must do if the council-manager plan is to be a continued success. Some of the evidences of the professional status of managership are briefly indicated. (1) The salaries paid are such as to make the position of manager attractive. Managers are paid much more than mayors in cities of comparable size. Managers of cities between 50,000 and 100,000 population receive an average salary of nearly \$9,000; mayors of cities in that class receive slightly more than half that amount. (2) The tenure of managers has steadily lengthened. In 1921 it was two years; at present it is approximately six years. (3) Successful managers are often promoted—offered positions in cities which pay higher salaries. This was infrequent during the early years of the plan; now it is not at all uncommon. (4) The managers have developed a professional spirit. A City Managers' Association was formed in 1914, an association which has steadily grown in importance and which has, among other things, produced a code of ethics for managers. (5) In keeping with these developments, an interest in training managers has become very pronounced. The Managers' Association has given attention to this problem and several educational institutions have outlined courses of training for those who hope to enter the profession. It may be said that the preparation generally considered desirable emphasizes engineering, public finance, accounting, municipal administration, and city-planning. Of course a manager must be an executive, but there

²² Quoted in Macdonald, *op. cit.*, p. 206, from the revised Code of Ethics (1938) of the City Managers' Association.

is some question as to what courses, if any, train one to be an executive. An essential feature of any such training should be a period of "internship" in a manager's office. Efforts have been made to provide for this, but not many managers will or can make room for an "apprentice" or "intern."

In concluding this sketch of the council-manager plan, it may be said that it corrected the great weakness of the commission system by concentrating executive authority in the person of the manager; that it has developed professional administration for cities; that it has given general satisfaction in its operation; in short, that it has taken its place as an acceptable form of city government.²³

The problem of metropolitan areas. Simultaneously with the growth of our great cities, the small cities and villages which were formerly some miles removed from them have extended their own boundaries until they are contiguous with those of the "hub" cities. New York, Chicago, and several other municipal "leviathans" are partially surrounded by satellite (one might almost say "parasitic") cities. A great metropolitan area thus formed is physically, and to a large extent, economically and socially, a single urban unit; but governmentally, the area is composed of a number of separate corporations. Some years ago legal consolidation of surrounding cities with the greater city was quite common and the results were reasonably satisfactory; but it seems that the newer communities, because of the likelihood of a higher tax rate, a feeling of social superiority, or for other reasons, are less inclined to be annexed now than a generation ago. It seems fair to assume that fire and police protection, water supply, sanitation, in fact that practically every important municipal function could be more economically and more efficiently administered by one government than by half a dozen. Unity of action in certain functions is sometimes secured by the creation of special districts. Thus, Oakland, Berkeley, and some other cities in that vicinity are included in a single district for water supply; and a sanitary district takes care of sewage disposal for the Chicago metropolitan area.²⁴ But the consolidation of a particular function of several contiguous cities is only a piecemeal method of attaining the desired administrative entity for metropolitan areas. It is a step in the right direction, but leaves too many functions to be independently administered by the authorities of the separate cities.

CITY-COUNTY CONSOLIDATION. The city area is ordinarily a part of the territory of the county. County officers have authority in its urban as well as in its rural sections. Since county and city governments have some identical functions, their jurisdictions in respect to these functions over-

²³ On the council-manager plan, see E. S. Griffith, *Current Municipal Problems* (1933); C. E. Ridley and O. F. Nolting, *The City-Manager Profession* (1934); C. P. Taft, *City Management: The Cincinnati Experiment* (1933); L. D. White, *The City Manager* (1927); and standard texts on municipal government.

²⁴ Dodd, *op. cit.*, p. 385.

lap. For example, the sheriff and the other law enforcement officers of the county may legally act in the city, despite the fact that the city has its own police officers. It is true that in actual practice the county enforcement officers usually confine their activities to the rural districts. Sometimes, legal provision is made to give city authorities practically exclusive control within the city. This is often done in the domains of education and charity administration. Nevertheless, there is still too much duplication and confusion resulting from the overlapping authority of city and county officers. A few states have attempted to correct these conditions by city-county consolidation. The city and county of Philadelphia were practically consolidated in 1854, although the county officers still have certain functions. San Francisco, Baltimore, St. Louis, and Denver are detached from counties and have governments independent of them. In Virginia, all cities are closed to county authorities, the cities administering both municipal and county functions.²⁵ Some other examples might be given, but it must be said that the progress of such consolidations is slow. Rural communities will frequently oppose a city-county consolidation because it means to them an increase in taxes, and they will oppose the detachment of the cities from the counties because it means a heavy loss in taxable property. The opposition is logical enough in both cases.

THE POSSIBILITY OF "REGIONS." But even if counties and cities have the constitutional authority to consolidate or separate, and vote to do one or the other, the problem of the metropolitan area is left unsettled in many regions. This is true because an urban area may extend into several counties or into several states. The problem then becomes very complex. A number of students of the metropolitan area are now recommending a new political unit to be called the "region." This unit would be given the authority to deal with such matters as sanitation, health, transportation, and planning for all of the units of government within a designated metropolitan area. There is much to be said for the proposal, but before such a plan can be put into operation the electorate, the state legislatures, and Congress (to approve interstate compacts) must be converted to it. But, as indicated above, government units in certain regions have united upon specific functions—water in the San Francisco area and sewage disposal in the Chicago area. The Boston region has a number of authorities whose jurisdiction extends over that metropolitan district. The New York Port Authority, a shining example of regional co-operation, was established by compact between New York and New Jersey with the approval of Congress. Yet the big job remains to be done—the job of organizing the metropolitan region to exercise authority in all matters of common interest in the area.²⁶

²⁵ *Ibid.*, pp. 382 ff.; Macdonald, *op. cit.*, pp. 118 ff.; R. B. Pinchbeck, "City-County Separation in Virginia" *National Municipal Review*, July, 1940, pp. 467-492.

²⁶ C. E. Merriam, S. D. Parratt, and A. Lepawsky, *The Government of the Metropolitan Region of Chicago* (1933); New York State Constitutional Convention Committee, *New York City Government; Functions and Problems* (1938).

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The Civil Service



The student is no doubt much more interested in the human side of the government than in the administrative structure discussed in the two preceding chapters. The high executive and administrative officers have already received attention. We are now to go into the ranks of the approximately 6,000,000 employees of the national, state and local governments.¹ These are, so to speak, the privates and non-commissioned officers of the forces of administration. They do the routine work, and they are the government agents with whom the humblest citizen comes into daily contact. In exploring the government's civil servant problem, we shall take care not to lose sight of the servant himself. To express it concretely, we shall interest ourselves in our postman: how he got his job, his pay, his chances for promotion, the manner in which he may be disciplined for failure to perform his duty, and his ultimate retirement on an annuity. The personnel problem is very much the same in any unit of government; but we shall treat of the national government's problem first, following it with a brief discussion of state and local administrative personnel.

I. A BRIEF HISTORY OF THE NATIONAL CIVIL SERVICE ²

The period of efficiency. It was not until about sixty years ago that any serious restrictions were placed upon those who appointed our minor federal officers and employees. From Washington to John Quincy Adams (1829), Presidents and heads of departments usually picked for federal positions the best men available. Washington's appointments were without regard to party, although he showed some preference for Federalists during his second administration. Old soldiers, however much they might win the personal sympathies of those in authority, received no appointments unless they possessed the requisite qualifications. Washing-

¹ In 1941, Mosher and Kingsley, (p. 38), gave an estimate ranging from 4,454,000 to 4,629,000 including 1,208,000 teachers. Since that date the numbers of federal employees has been increased to nearly 3,000,000. There are now probably 1,200,000 teachers, 550,000 state, 975,000 municipal, and 625,000 county and minor unit employees.

² C. R. Fish, *The Civil Service and the Patronage* (1905); W. D. Foulke, *Fighting the Spoilsman* (1919); L. Mayers, *The Federal Service* (1922); Chs. I-V; C. E. Merriam and H. F. Gosnell, *The American Party System* (1940 ed.), Chs. IX-XII; W. E. Mosher and J. D. Kingsley, *Public Personnel Administration* (1941 ed.), Chs. I-VI; L. D. White, *Public Administration* (1939 ed.), Chs. XVIII-XIX.

ton and John Adams were followed by Jefferson and his Democratic party. The only change which the new party made consisted in the removal of a few Federalist officeholders in order to give places to Democrats and thus bring about a sort of equilibrium between the two parties in the matter of offices. After two years, no more removals were made, and the only questions asked concerning a candidate for office were: "Is he honest? Is he capable? Is he faithful to the Constitution?"³

The period of unblushing spoils. Jackson is frequently charged with the responsibility of bringing in the era of spoils. He was President at the time and he favored "the system," but there were a number of accomplices in the crime. Twenty years or more before Jackson's advent to power, the spoils system made its beginning in some of the states, particularly in New York. In 1820 Congress established the four-year term for certain offices, and from time to time included other offices in the same category. Although the provisions of this Tenure of Office Act were not used for spoils purposes until 1829, it is clear that they constituted an alarming threat to the civil service. Jackson was the champion of the rugged class which had put him in power and which believed that the people should rule in fact as well as in theory. The new President's views concerning offices may be summarized in a few sentences. Long continuance in office sometimes causes men to become careless and often corrupt. The duties of public office are so simple, or should be made so simple, that any man of intelligence can perform them. In a people's government one man has no more right to public office than another. The argument was plausible, even that part referring to the simple duties which officeholders performed; for government was relatively simple in Jackson's day. With a clear conscience, Jackson accepted the aid of Van Buren and others, and put his philosophy into practice. At bottom, the reason for the introduction of the spoils system was simply this: the democratic revolution of the Jacksonian period put forward new leaders who, unlike the well born gentlemen who for the most part directed our political destinies during the first forty years of our national existence, were usually men of small means. They could not support themselves and give their time unselfishly to politics. They had to make politics pay. Elective offices took care of a few; but the rank and file, the local leaders, found sustenance in the postal service, the revenue service, or in other appointive positions.⁴

Decline of the service. Under the new system, the efficiency of the federal service declined rapidly. Outright corruption was not uncommon. Swartwout, collector of the Port of New York, fled to Spain with over \$1,250,000 which belonged to the federal treasury. Nor were "the people" particularly indignant. They smiled, marveled at the thief's boldness, and for years laughingly referred to any official who stole public funds

³ Quoted from Jefferson's *Writings* in Fish, *op. cit.*, p. 36.

⁴ Fish, *op. cit.*, pp. 156-157.

as a "Swartwouter." The spoils system suited the rugged and none too scrupulous individualism of the times. The new Whig party criticized it severely; but when it came into power, it removed Democrats and installed Whigs, following spoils principles in good Jacksonian fashion. In short, the spoils system became an established institution. All Presidents from Jackson to Garfield were either its ardent supporters or its unresisting victims.

The age of reform. As early as 1853, Congress made some attempt to introduce the merit system by ordering the classification of clerks in the departments and by the requirement that only those who passed examinations should be appointed. This law was defective in several ways. It did not put selection on an open competitive basis; but left politicians to name their men, who then secured positions upon passing the examinations. It was thus unfair to those who happened to have no political friends to name them for places, and it handicapped administrative authorities, in that they had no group of eligibles from which they could choose the most competent. Furthermore, the law was very indifferently enforced after the first few years of its existence. Another civil service act was passed in 1871; but it was abandoned by President Grant two years later because of his own coolness toward the law and the lack of financial and moral support in Congress. But there was still some conscience in the land. George William Curtis and other advocates of civil service reform continued their work, with a slowly mounting public sentiment behind them. The assassination of Garfield, in 1881, by a disappointed office seeker gave the reform movement a decided stimulus. Two years later Congress passed the famous Pendleton Act, the main features of which are still in force.

THE PENDLETON ACT. Some of the more important provisions of the Pendleton Act are here summarized. (1) Certain groups of civil service employees are classified, that is, brought under the merit system, by the statute, and others may be so classified at the discretion of the President and the heads of departments. Other employees remain unclassified or outside the merit system. (2) Entrance into the classified service is by open, competitive examination, and recommendations from Congressmen "except as to the character or residence of the applicant" are not considered. (3) Preference in employment is to be given to war veterans. (4) Employees are free from assessment for party purposes and denied the privilege of active participation in politics. (5) The Act is carried into effect very largely by the President, acting through a bipartisan Civil Service Commission of three members.

Extension of the merit system. Perhaps the most fundamental provision of the Pendleton Act is the one which authorizes the President to increase the number of offices in the classified list. Only the classified offices are under the merit system, and the system is therefore a farce unless the

Presidents generously exercise their powers to enlarge the list. How have they responded to this duty? When the law first went into effect (1883), only 13,924 of the 131,000 federal employees were placed in the classified service. This was a cautious beginning. But every President has added employees to the classified list. For example, Cleveland added the railway mail clerks; Harrison, the clerks and carriers of the free delivery post offices; McKinley, the Philippine service; Theodore Roosevelt, the rural free delivery men, and a number of others; Wilson, income-tax employees and others; Hoover, employees of the District of Columbia; Franklin Roosevelt, certain employees of the Farm Credit Administration and of various other agencies. But Congress has not left to the Presidents the entire responsibility of extending the merit system. For example, it placed the Census Bureau's employees under the system in 1902 and did the same for those in the Prohibition Bureau in 1927.

A most significant victory in recent years for the merit principle came when postmasters were brought under it in 1937. For many years the "most prized prerogative" of each majority member of the House of Representatives was the right to name the first, second, and third class postmasters in his district. (Fourth class, rural, postmasters have been under the merit system since Taft's Administration.) Wilson gave congressmen a jolt by an order to the Civil Service Commission to hold an examination whenever a vacancy occurred in one of the three classes. Somewhat heroically the President named, for the four-year statutory term, the man who passed the best examination. With the change of administrations Wilson's order was practically nullified. In July, 1936, President Roosevelt issued an executive order making future postmasters subject to merit selection. But an act of Congress was required to abolish the four-year term and really make the merit principle effective. Backed by the prestige of his great victory in November and by the recommendations of his Committee on Administrative Management, the President finally achieved victory in the Ramspeck-O'Mahoney Postmaster Act (1938). By this legislation the first, second, and third class postmasters, nearly 15,000 of them, were placed under the classified service. They are still, perhaps unfortunately, to be appointed by the President and the Senate, but important elements of the merit system are imposed by the provision that only candidates certified by the Civil Service Commission as having the highest rating shall be appointed and by the further provision that the appointment shall be indefinite, not for just four years as formerly.

In 1938 President Roosevelt extended the competitive service to all employees for whom the statute authorized him to make such requirement. This brought about 45,000 more employees under the merit system. The number would have been practically doubled had not Congress excluded positions under the Works Projects Administration. The President, in the face of this and other anti-merit system action on the part of Congress,

continued to urge Congress to give him authority to place nearly all other federal employees under that system. In November, 1940, Congress, with "agony and groans," passed the Ramspeck Act, a measure of more promise for the merit system than any enacted since the passage of the original civil service act. It authorized the President to place within the classified service nearly all of the federal employees, and provided that incumbents of 1940 should retain their positions, if they had served satisfactorily for six months and if they could pass a non-competitive qualifying test. The President was not slow to begin the exercise of this authority, and the percentage of federal employees under the merit system soon reached an all-time high.

But the spoilsmen die hard. The reformers have had to fight for the merit system every foot of the way; often they have had to retake lost ground. In times of emergency it is necessary to lower standards somewhat, and that need is used as an excuse for a rush for a return to the spoils system. During the First World War and immediately thereafter there was a lowering of standards and an increase in the number of "exempt" positions. The situation was even worse when the New Deal set up its many agencies to deal with the great depression. The present demand for federal employees for war positions will doubtless mean another setback. In any event, those who would improve the status and quality of public employees must fight continuously.

The good work started under President Arthur was partly undone by President Cleveland, who was hard pressed by Democrats whose appetites had been whetted by seeing the Republicans eat at the public crib for twenty-five years. When the Republicans came back into power, Cleveland's extensions of the merit system were partially set aside in order to make room for the faithful. The moral fervor which in part characterized the Democratic victory in 1912 did not deter President Wilson from yielding to the importunities of his followers, who had experienced sixteen lean years. Flushing with triumph, the Republican President and his advisers, in starting the country on the road to "normalcy" in 1921, had few qualms of conscience and followed good precedent when they removed some Democrats "for the good of the service." Why do Presidents backslide? It is because there are still many people who do not believe in the merit system. They are not often so outspoken in their opposition as its enemies of fifty years ago, who ridiculed "snivel" service reform and labeled it the "Chinese system"; but considerable opposition and a great deal of indifference remain—opposition on the part of politicians, and indifference on the part of the public.

In 1914 William Jennings Bryan, while Secretary of State, asked the Receiver-General of Customs at Santo Domingo to let him know what positions he had for "deserving Democrats." Speaking of the first Wilson administration, Vice President Marshall said his only regret was that they

could not displace more Republicans and give their jobs to Democrats. Harding's Assistant Postmaster General, John M. Bartlett, regretted that offices which paid as high as \$5,000 should be in the classified service. "What's wrong with the spoils system?" shouted a congressman from Oklahoma on the floor of the House in 1937. "America has grown great on spoils," he declared. "I can do a better job of picking the postmasters for my district than any Civil Service Commissioner."⁵ It is a matter of regret that the Member spoke the sentiments of a large number of his colleagues.

Why the merit system anyway? The reader might raise the question, "Why, after all, should we be so insistent about the merit system? Why shouldn't the winning party have the offices?" The victorious party should have the political offices, the few offices in which policies are formulated; for otherwise, the party would have some difficulty in carrying out the program it submitted to the people during the campaign. But the great majority of the offices, perhaps ninety-nine per cent of them, are non-political. These should be under the merit system for the following reasons. (1) The merit system removes the demoralizing influence in the service which the partisan scuffle for office causes. (2) It very largely prevents the assessment of officeholders for political purposes. (3) It requires of the civil servants loyalty to the government rather than loyalty to a party. (4) It gives the employees security of tenure, without which no technical or professional officer can do his best work. (5) It elevates the civil service to a profession. (6) It makes possible a high degree of specialization within the service—an indispensable achievement if the government is to carry out the many technical duties it now assumes. No doubt other claims could be made for the merit system, but these will suffice. The President's Committee on Administrative Management recommended (1937) that all officers be selected and retained on the merit basis, excepting only those called to the highest position and who have policies to determine. President Roosevelt's program of extending the merit system was, of course, based largely upon this recommendation.⁶

II. THE OPERATION OF THE NATIONAL CIVIL SERVICE LAWS⁷

The Civil Service Commission. As already mentioned, the Act of 1883 provided for a bipartisan Civil Service Commission of three persons, to be appointed by the President and Senate. Some very able men have served on this Commission. Theodore Roosevelt was a member from 1889 to 1895, and Professor Leonard D. White, one of the country's leading au-

⁵ *Time*, February 8, 1937.

⁶ *Report*, p. 9.

⁷ *Annual Reports of the U.S. Civil Service Commission*; Mayers, *op. cit.*, Chs. VI-XVI; Mosher and Kingsley, *op. cit.*, F. W. Reeves and P. T. David, *Personnel Administration in the Federal Government* (1937); White, *op. cit.*, Chs. XX-XXIX.

thorities on public administration, served from 1934 to 1937. Several times the Commission has passed through the fire of congressional investigation, and each investigation seems to have added to its good reputation. Acting under the original civil service law and other statutes and functioning under the general direction of the President, the Commission provides for open competitive examinations, and certifies those who have passed with the highest grades to the appointing officers; administers statutory provisions and civil service regulations on the political activity of federal classified employees and certain state and local employees participating in federally financed activities; maintains service records and qualifications records of all federal employees; conducts investigations relating to the civil service; provides a system of promotion; establishes, in co-operation with other government agencies, training courses for federal employees; and administers the Classification Act and the Civil Service Retirement Act. These functions the Commission discharges through fourteen divisions and several other units. For convenience in meeting the employment needs of federal administrative agencies scattered throughout the United States, the nation is divided into thirteen civil service districts, each with headquarters in some principal city. Under the supervision of the district offices are approximately 5,000 local boards of examiners. Since 1940, much of the effort of the Commission and these district offices has been directed to meeting the unprecedented needs of the government for employees in numerous war agencies.

Variety of civil service examinations. There is no such thing as *the* civil service examination. Different work calls for different qualifications, and it follows that there are as many different examinations as there are different positions to be filled. The idea that the average person has, of a single civil service clerical examination which most high school graduates could pass, is all wrong. Of course, there are many examinations for clerkships paying from, say, \$1,200 to \$2,000 a year; but there are thousands of positions requiring the highest training and paying \$3,000, \$4,000, \$5,000, or even more. Looking through the list of civil service "offerings," we find that our government wants, among many other experts, poultry geneticists (\$3,800 to \$4,000 per annum); teachers of colonial weaving (\$1,800); several grades of guidance and placement officers (\$2,600-\$4,400); seamstresses (\$1,300); senior olericulturists (\$4,600-\$5,400); assistant and associate fisheries economists (\$2,600-\$3,800); assistant pomologists (\$2,600-\$3,200); experts in social service administration (\$3,200-\$3,800); varying grades of home economics specialists (\$2,600-\$5,200); sugar beet pathologists (\$3,800-\$4,400); radio engineers, from assistants to seniors (\$2,600-\$4,600); assistant gardeners (\$1,260); assistant leather chemists (\$2,600); toxicologists (\$3,800-\$4,600); research assistants for the Civil Service Commission (\$3,200); educationists (\$3,800-\$4,600); and principal agronomists for wheat investigations (\$5,600-\$6,400). Applicants for positions of the

type mentioned are given "unassembled" examinations, which will be explained later.

The civil service has places also, with appropriate salaries, for elevator conductors, elevator mechanics, antinarcotic agents, woodworker helpers, junior foresters and range examiners, junior mathematicians, assistant accountants, junior observers in meteorology, assistant inspectors for radio enforcement, radio operators, reservation protectors of mammals and birds, diarymen, junior microanalysts, computers, stenographers, and typists, to mention only a few. Positions of these and similar classes are filled from the list of applicants who pass "assembled" examinations, presently to be explained. If the student is unfamiliar with some of the titles named above, he is in the same class as the writer; but the random selection nevertheless gives us some idea of the more than 1,700 varieties of civil service examinations. From 1933 to 1940 the annual average number of applicants examined was well over a half million, and the number has been much higher since the latter date.⁸

"UNASSEMBLED" AND "ASSEMBLED" EXAMINATIONS. Applicants for the higher class positions in the civil service are not usually required to report at any place for examination. Hence, the term "unassembled" is applied to such examinations. Competitors for the kinds of positions just mentioned really take no examination at all; but they must forward material showing their qualifications to the Civil Service Commission, where it is passed upon by designated officers. Thus, a man who wishes to qualify for the position of associate fisheries economist must show that he is a college graduate; that he has had experience in matters related to fisheries; and must submit a thesis or publication on the subject. With all the relevant facts before the examining committee, he can be graded more satisfactorily by this method than by the regular type of examination with which the college student is familiar.

The rank and file of competitors for places in the civil service take the "assembled" examination. For example, stenographers and typists must go to one of the 500 or more designated places in the states and territories and take a regular examination on the practical subjects in which stenographers and typists are expected to be proficient. The papers are then graded and the competitors listed in the order of their proficiency.

NONCOMPETITIVE EXAMINATIONS. The types of examinations discussed above are competitive, and the high men get the positions. Although nearly all the civil service examinations are of this character, the non-competitive principle is applied in certain cases. This "pass" system is generally held to be pernicious and regarded as likely to be little better than no examination at all, if employed for securing clerical employees;

⁸ In the depression years, considerable less than half of the applicants passed the examinations.

but in special cases, and for certain important positions, it is probably desirable. For example, it seems only fair to use this method of examination for those holding positions at the time such positions are brought within the classified service.

PRACTICAL VS. GENERAL EXAMINATIONS. The law requires that all civil service examinations be practical, and, in general, this rule is adhered to. Many students of personnel problems think we have overdone the "practical" feature in our examinations. They hold that the English system is better. Under that system, candidates are given general rather than practical examinations. Those who seek the higher places in the service are given what constitutes essentially an examination for a university degree, and those who are candidates for the lower places are examined on subjects taught in the public schools. The English theory is that these examinations result in the selection of the best all-round men, who can easily learn the practical duties of office when assigned to them. The very high character of the English civil service seems to indicate strength in the theory. During the last few years the Civil Service Commission has developed a general-purpose examination for recent college graduates. It has some kinship with the English type of examination and it is believed that it is bringing to the public service capable men who will develop as administrators.

Appointment. We return now to those who take the competitive examinations. All who obtain a rating of 70% or better are placed on the eligible list. When a particular position becomes vacant, the appointing officer must fill it by the selection of one of the three highest on the list of eligibles for that position. The department head or other high administrative officer who makes the appointment is allowed to choose one of three, in order that he may consider personality and special qualifications in making the selection. It is obvious that this discretion may at times be abused, but there is no doubt that it is used to good advantage by conscientious officials.

A civil service rule requires that "as nearly as the conditions of good administration will warrant" the appointments shall be made among the states and territories upon the basis of population. It has not been possible, however, to adhere to this rule very closely. Some states do not furnish their quotas of eligibles, and some, particularly the North Atlantic states, furnish an excess. Furthermore, fair apportionment is difficult if not impossible to maintain, due to the fact that veterans and their wives or widows are appointed without regard to apportionment principles, although such appointments are charged to the state quotas.

VETERAN PREFERENCE. This brings us to the subject of veteran preference. It has long been our practice to make special concessions to veterans in the civil service. These concessions, which are being augmented almost

every year, may be stated in a few sentences. (1) There is no age limit for veterans. (2) The apportionment provision does not apply in their case. (3) Height and weight requirements are ordinarily dispensed with. (4) Closed examinations may be reopened to veterans under certain conditions. (5) An appointing officer who passes over an eligible veteran and selects a non-veteran with the same, or lower, rating must file with the Civil Service Commission his reasons for so doing. (6) A veteran who is not disabled has 5 points added to his examination grade, thus making 65 the "pass mark" for him, while 70 is required of non-veterans.

Veterans who have a service-connected disability, wives of injured veterans who themselves are not qualified for appointment, and veterans' widows, are given still larger privileges. (1) The commission may waive physical requirements in the case of disabled veterans. (2) It may hold quarterly examinations exclusively for men and women entitled to disability preference, even though lists from which appointments are made already contain eligibles. (3) The disabled veterans, widows of veterans, and wives of veterans who themselves are physically incapacitated for the civil service, have 10 points added to their earned rating. (4) They are accorded a much greater favor through the provision that, if eligible for appointment, they shall be certified ahead of all ordinary veterans and non-veterans, regardless of their ratings. Veterans of either class, disabled or not disabled, are given preference in retention in the service when a reduction in the force occurs.⁹

IS VETERAN PREFERENCE FAIR TO THE SERVICE? There is no reason why the veterans should not have some of the privileges mentioned. But, should able-bodied veterans be given 5 extra points, and should disabled veterans, wives of incapacitated veterans, and veterans' widows be given 10 extra points and, in addition, be placed at the top of the list of eligibles, regardless of their ratings? The basis of the civil service is merit—the appointment of candidates best qualified for the positions. Having regard to the purpose of the merit system, to answer in the affirmative the question just raised, one must argue somewhat as follows: "Able-bodied veterans are 5 points more competent to fill civil service positions than are non-veterans possessing the same qualifications. Disabled veterans, wives, and widows are 10 points more competent than non-veterans, and 5 points more competent than physically fit veterans. Not only that, but those in the '10-point' class are so competent that they must be appointed before any other eligibles may be selected." This "argument" is absurd. Veteran preference does not rest upon the merit system, but it is based upon the theory that the government should take proper care of the veterans. This theory is not disputed; but many students of public personnel problems maintain that the government should discharge its obligation through

⁹ On the rules relative to veteran preference, see *Annual Reports of the Civil Service Commission*, especially that for the year 1931, pp. 8-11 and for the year 1932, pp. 19 ff.

other means; that the "state as administrator should not bow to the state as almoner."¹⁰

Promotion. Under the merit system the new employee is on probation for six months. If he serves satisfactorily through this period, he becomes a regular member of the great body of civil servants; and, if he is a normal human being, he hopes to receive promotions from time to time. His chances are not so good in some branches of the federal service as they are in private business. This is because relatively few men are needed in the higher positions and because too many of these positions are filled by political appointment rather than by promotion of "career" men. The Civil Service Commission has done very little about promotions, leaving that important phase of personnel administration very largely to the appointing officers in the departments.

THE QUESTION OF OPEN OR CLOSED SERVICES. Congress has by statute required that the higher places in certain branches of the service, for example, in the medical corps of the Public Health Service, be filled by promotion from the lower positions. In some other administrative units the appointing officers, of their own volition, have followed the system of filling the upper grades by promotion from within the service rather than by recruitment from without. This is a tradition in the postal service. All the 300,000 postal employees, except the chief officers in the Department at Washington and the first-, second-, and third-class postmasters,¹¹ enter the service as clerks or carriers. From this humble beginning, a clerk or carrier with the requisite qualifications may be promoted by successive stages until he becomes postmaster of a large city, division superintendent of railway mail, or receives some other responsible position. Many positions in the federal service above the lowest grade must be or may be filled by recruitment. Such positions are said to be "open," as distinguished from the places filled by promotion, which are designated as "closed."

Authorities on personnel generally favor the closed system, on the grounds that it offers strong inducements to competent and ambitious persons to enter the service at an early age, increases the opportunity for advancement, and improves the morale of the employees. Few will deny, however, that the open system often makes possible better selections for special and important positions; and a rigid use of the closed system in all lines of the civil service is seldom advocated. We somewhat cautiously conclude, then, that promotion is the more desirable method of filling positions above the lower grade if training for the higher positions can be readily acquired by experience in the service, and that recruitment

¹⁰ About one fourth of the civil service employees selected between 1919 and 1939 fell within the veteran classification. Mosher and Kingsley, *op. cit.*, p. 241.

¹¹ Although now within the classified service postmasterships may still be filled by recruitments.

from the outside is advisable if the positions require broad general education or special technical training.¹²

THE BASIS OF PROMOTION. One of the most perplexing questions in the field of personnel administration, according to Lewis Mayers,¹³ is that of the method of selection for promotion. In all except the largest organizations, the administrative officer has sufficient contact with his force to know who should be promoted. However, some formal method of promotion is usually recommended. Such a method furnishes the officer responsible for promotions with a fairly high degree of protection from political pressure, and gives the rank and file of employees the feeling that they are receiving fair treatment in the matter of advancement—a most important factor in keeping up the morale of the service.

Despite the generally recognized advantages of some formal method of promotion—promotion on the basis of seniority, service record, examinations, or a combination of these—the administrative officers in nearly all branches of the federal service have almost complete discretion in selecting men for advancement. An exception to this practice is noted in the Public Health Service, where certain officers and employees are promoted only after a term of years in each grade and the passing of an examination for the next grade. In most of the departments there is a requirement that service or efficiency records be kept for the employees; but these records are far from perfectly kept, and in few departments, if any, are they more than very general guides to the administrative officers. It is generally agreed, however, that higher administrative officers should have a fairly wide degree of discretion in the matter of promotions; that any detailed plan established by the Civil Service Commission would unduly interfere with the necessary freedom of action of administrative chiefs. Perhaps the federal service has found a partial solution for the problem. An Executive order of 1938 directed the Civil Service Commission to prepare a plan for promotion and transfer, and the Commission has devised such a plan. It charges the departments with the responsibility of developing and administering competitive promotion tests and procedures, subject to certain conditions of which the following are the most significant: (1) announcement, extent, and notice of competition; (2) nature of examinations; (3) and conditions for noncompetitive promotion. It will be noticed that the Commission fixes only general standards, leaving to the departments the problem of working out the details within the broad limits prescribed. It seems that little has been accomplished as yet, although the plan holds promise.¹⁴

Discipline and removal. In any business organization it is most important that effective forms of discipline and removal be maintained; other-

¹² On this topic, see Mayers, *op. cit.*, Ch. VIII and Mosher and Kingsley, *op. cit.*, Chs. XV and XXII.

¹³ *Op. cit.*, pp. 303-304.

¹⁴ Mosher and Kingsley, *op. cit.*, p. 319.

wise it is impossible to secure from all employees a satisfactory standard of service. Private business ordinarily has no difficulty in applying rather drastic and summary disciplinary principles, but governments are often charged, perhaps thoughtlessly, with "going easy" with their employees. Public employees may often have influence with some legislator or other official, and, to avoid difficulty, disciplinary officers occasionally put up with an employee who is far below the standard. Then too, since the element of profit is absent from the public service, one of the strong incentives for weeding out those who function at a loss is absent. Also, the officer who has immediate supervision of an employee usually lacks the authority to remove him, that form of execution being reserved for the department head or some other high official. The higher officers of the federal service do have adequate powers of discipline and removal, but, for the reasons just given, the powers are perhaps not so freely exercised as they should be.

What are the legal requirements respecting removals? A federal statute of 1912, which has served as a model in a number of states and cities, provides that no person in the classified service shall be removed "except for such cause as will promote the efficiency of said service"; that the reasons for a removal must be given in writing to the person whose removal is sought; that such person shall be given time to answer these reasons in writing; "but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal." The act also provides that "in making removals or reductions, and in other punishments, like penalties shall be imposed for like offenses, and no discrimination shall be exercised for political or religious reasons."¹⁵ The original Civil Service Act forbids any officer or employee of the United States mentioned in the act to "discharge or promote, or degrade, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable for any political purpose."

Manifestly, the power of administrative officers to make removals is not seriously restricted by laws and rules. But conscience and the traditions of the service are usually, although not always, sufficient to protect employees from unjust removal. Removals and other forms of disciplinary action are relatively few in number, the employee usually receiving the benefit of any doubt.

Partisan activity prohibited. Various efforts are made to protect those under the merit system from political pressure on the one hand, and to restrain them from voluntary partisan activity, on the other. The Civil Service Act prohibits any officer of the United States, except the President, from soliciting or receiving a contribution from any other officer or em-

¹⁵ 37 Stat. 555, sec. 13.

ployee for a political purpose. The Civil Service Commission is authorized to investigate violations of this provision and it has shown considerable energy in exercising this power. The act further states that no person in the public service is for that reason under any obligation to render any political service, and that no person in the service has any right to coerce the political action of any other person. Although there are no penalties prescribed for the violation of this provision, it is generally believed that it is fairly well observed.¹⁶ The federal employee does not enjoy full protection from political pressure, however. Persons not holding any office may solicit him anywhere except at the place of his employment. It requires no stretch of the imagination to realize that a non-officeholder active in politics may, almost as easily as an official superior, coerce an employee.¹⁷ The law should, therefore, be broadened to prohibit solicitation by any person.

May an employee of his own free will engage in partisan activities? Rule I of the civil service regulations states that he retains the right to vote and to express privately his opinions on all political subjects, but that he shall take no active part in political management or political campaigns. In practice, this rule means that an employee may do such things as attend party meetings and vote in the same, if he takes no active part; hold membership, but not office, in political clubs; and make party contributions through any person not employed by the United States. The rule is interpreted to prohibit him from doing such things as serving as a delegate to a convention, offering himself as a candidate for office, distributing campaign literature, transporting voters to and from the polls, and betting upon the results of elections. Those in the competitive classified civil service are thus rather severely limited with respect to political conduct—some say to the point where they cannot exercise their rights as citizens. But as long as so many superior administrative officers hold their positions as political appointees, it is doubtful if the rank and file of the employees responsible to them could find adequate protection from political coercion but for this rule. We have, then, an interesting case of a rule apparently designed to curb the partisan activities of the general run of employees, but which serves the much more useful purpose of protecting them from the partisan influence of their superiors.

THE HATCH ACTS. These measures of 1939 and 1940 were explained in part in Chapter 9, section VII, but it is deemed necessary to add a paragraph here on their prohibitions regarding partisan activity in the civil service. The first of these acts was designed to curb the political activity of unclassified (these had been the worst offenders) as well as classified civil servants. With the exception of a few score high officials,

¹⁶ Mayers, *op. cit.*, p. 158.

¹⁷ In 1928 federal employees were urged to form "Hoover-for-President" clubs. The initiation fee was ten dollars. The clubs never met. The "initiation fees" were turned over to the campaign committee. Peel and Donnelly, *The 1928 Campaign*, p. 46.

all civil servants are prohibited from engaging in "pernicious political activities." As interpreted this act means that federal employees may not, with certain very minor exceptions, run for public office or take part in party affairs. The law does not, however, apply to unclassified employees with the same severity with which it applies to those who are classified, the former still having the "privilege" of being solicited for campaign funds and the right to express publicly (classified employees only privately) their opinions, providing such public utterance does not constitute a part of an organized campaign. The act of 1940 forbids any person employed by a state or local government, in a service financed wholly or principally by the federal government, to participate in party management and political campaigns, to solicit party funds, and otherwise to engage in political activities. The Civil Service Commission carries a large part of the difficult assignment of enforcing these acts. If classified employees of the federal service violate the first act, the Commission sees to it that they are removed from office; if unclassified employees violate it, the Commission reports to the federal agencies to which such employees are assigned, and the agencies are supposed to make the removals. In the case of the second act, federal agencies having charge of disbursements to state and local agencies report all violations to the Commission and the Commission may make investigations of its own. A state or local government, upon being informed of the delinquency of an employee, must remove him; and if it does not do so, the federal agency through which the funds are supplied for the project on which he is employed withholds a sum of money double the culprit's salary. Such laws do not mark the beginning of a millennium of politically clean public employees. They rather mark another, and belated, attempt to remove some of the worst features of politics from administration.

Employees' organizations. Related somewhat to the general question of the political activities of employees, is the problem of employees' organizations.¹⁸ Just as laborers and professional men not in government employment have their unions and associations for vocational and professional purposes, so the civil servants have developed their organizations with similar ends in view. It is true that public employees adopted the plan of organization later than private employees; but in the past thirty-five years the former have shown a growing tendency to organize, and there is little doubt that this movement will continue. There are a number of such organizations within the postal service. Of these, the National Federation of Post Office Clerks and the Railway Mail Association may be mentioned. A National Federation of Federal Employees (founded in 1917), with locals throughout the country, receives practically all civil servants who desire membership except postal employees. In 1931 a

¹⁸ On this topic see Mosher and Kingsley, *op. cit.*, Chs. XXIV, XXV; White, *op. cit.*, Chs. XXVII-XXIX.

dispute within the American Federation of Labor led to the formation of the American Federation of Federal Employees, an organization which has had an active if short history. Still later, in 1937, the A.F. of L. and the C.I.O. controversy led to the formation of the United Federal Workers of America, an organization which affiliated with the C.I.O.

Employees' organizations are naturally concerned with such matters as the maintenance of the merit system, the improvement of working conditions, salary increases and standardization, and pensions; and sometimes they show genuine interest in improving the quality of the services they render. Although it is true that such associations are not always unselfish and that their programs with respect to salaries, pensions, and some other phases of public employment may run counter to the public interest, their general influence is on the credit side of the ledger. They almost invariably support the merit system, collectively present their grievances, and otherwise build up the morale of the service. They also serve as units through which the higher administrative officers may effectively reach the whole body of employees. Technically, of course, there is no reason why this may not be done through regular official channels; practically, however, it is often much easier to secure whole-hearted co-operation through a conference with the leaders of the employees.

AFFILIATION WITH OUTSIDE GROUPS. Since 1912 the postal employees have been permitted to affiliate with the American Federation of Labor,¹⁹ and this permission logically extends to other civil servants. Employees' organizations may not, however, affiliate with outside associations which impose upon them the obligation to strike. Some congressmen and high administrative officials are nevertheless opposed to affiliation, and a few administrations have been charged with discriminating against employees active in civil service organizations. Despite the strike restriction, which materially weakens federal employees' organizations as allies of labor, the American Federation of Labor has welcomed affiliation. Not all the civil service organizations desire to affiliate, however, and in 1931 the National Federation of Federal Employees withdrew from affiliation.

Advantages of affiliation to government employees. The National Federation of Federal Employees by its own account profited immensely through co-operation with the A.F. of L. The latter seeks to prevent the imposition of "gag" rules upon the civil servants, works for their repeal where they have already been applied,²⁰ and champions the cause of these employees in the matter of hours of labor and wages. The seven-hour day for government clerks and the eight-hour day for workers under federal jurisdiction are achievements for which the A.F. of L. claims a large

¹⁹ The United Federal Workers of America is the only organization of federal employees which is affiliated with the C.I.O.

²⁰ See, for example, a protest of President Wm. Green, *New York Times*, July 17, 1932, p. 1.

share of credit. The interest of the Federation in the wages and conditions of employment in the civil service is twofold. First, there is a direct interest in those so employed; and, second, it is recognized that the standards of government employment will very materially influence standards in private employment. The A.F. of L. is equally interested and influential in the treatment of state and local employees, particularly city employees. Private labor has been a powerful ally, because it can act militantly and has millions of votes at its command. Support is not mutual, however; for, as already implied, the restrictions upon the activities of civil service organizations prevent them from giving any considerable assistance to the A.F. of L.

Is affiliation for the good of the service? Among students of public personnel problems there is division of opinion concerning the desirability of affiliation of federal employees' organizations with outside groups. Some hold that affiliation tends to confuse industrial and political questions, and has a strong tendency to increase selfish demands on the part of government employees. Others maintain that public opinion is not sufficient to insure such employees just treatment, and that affiliation, while perhaps objectionable in theory, is highly desirable in practice. In recent years, some progress in adjusting employees' grievances has been made along entirely different lines. Councils composed of representatives of the rank and file and of administrators have been instituted for the purpose of bringing the two groups together on a co-operative plan. Some such plan as this, say many students of public personnel, will furnish the means of giving the employees adequate consideration and protection, without the objectionable consequences which so frequently attend affiliation with private labor organizations.

T.V.A. MANAGEMENT-EMPLOYEE RELATIONS. Mosher and Kingsley instance as unique and promising the system of management-employee relations established by the Tennessee Valley Authority.²¹ Employees may bargain collectively, through representatives of their own choosing, without any restrictions. All matters of concern to the employees are submitted to their representatives before action is taken. The rights of workers and management are set forth clearly and in detail, and the procedures by which these rights are to be maintained are determined with the full approval of all concerned. Here, say the authorities, is pioneering in industrial citizenship, democracy in action on the economic front, where it really counts. The Authority has been able to deal with various labor organizations (some affiliated with A.F. of L. and others with C.I.O. and still others having no affiliation at all) in seven states. It is suggested that this enlightened policy, recognizing as it does that men should have more responsibility for their jobs than "doing what they are told" and

²¹ *Op. cit.*, pp. 566-567.

more interest in them than is measured by a salary check, may serve as a model for other government agencies. Certainly it is worth their careful study.

Salaries and classification. Salaries in the civil service are not, as a rule, quite so high as those paid for similar work in private employment. This is due primarily to the higher degree of security and permanence of public employment and to the fact that an annuity is provided for public employees when they reach the retirement age. Although the difference in compensation for private and public service has considerable justification, there is no defense for salary inequality within the service. This has long been one of the chief causes of discontent among the employees. In 1920 the Reclassification Commission reported: "Sometimes employees working side by side, doing the same work, will be receiving rates of pay varying by 50 per cent, or even more. Often the more efficient employees are paid at the lower rates. Many instances can be cited where the clerk in charge of a section or other minor organization unit is receiving less than other employees working under his direction. His compensation for the added responsibility," the report ironically continues, "lies in the fact that if one of his more highly paid subordinates resigns his chances of getting the vacancy are excellent."²² Such inequalities did not arise from design, but rather, from lack of any plan. New positions were created from time to time, and the compensation of the appointees was fixed without any particular regard to the nature of the duties to be performed or to the salaries of employees in the older positions.

The great problem is to devise a compensation system which will "provide uniform and equitable pay for the same character of employment." For the solution of this problem with respect to the federal employees in the District of Columbia, Congress created (1919) the Joint Commission on Reclassification of Salaries. The Commission made a separate class of each group of employees whose entrance requirements, work, and responsibilities were essentially the same. On this basis, it found 1,762 classes. The report of the Commission led to the Reclassification Act of 1923 (amended 1930). A Personnel Classification Board was created, and the reclassification of federal employees in the departments at Washington and in the postal service was brought about. Progress was slow in the field services, however, and the Board itself was presently (1932) liquidated. Only in 1940, under the Ramspeck Act, did reclassification again get under way.²³

Purposes of a retirement system. It is very generally recognized that a retirement system is highly desirable for the permanent civil servants.

²² Quoted in Mayers, *op. cit.*, pp. 190-191.

²³ In 1941 the Ramspeck-Mead Salary Adjustment Act granted overdue salary increases to those in the classified service who had not attained the maximum rate to which their positions entitled them.

Their salaries are low, and, without a retirement allowance, many of them, upon release from the service in old age, would be dependent upon relatives or become public charges. More important than this consideration from the standpoint of the efficiency of the service is the fact that if there is no provision for retirement allowance, administrative officers will be reluctant to dismiss employees whose age has rendered them inefficient. A former Commissioner of Pensions, Eugene Ware, was about to dismiss a thoroughly inefficient old man over eighty years of age. Before the order was issued the old fellow dropped dead. The Commissioner reflected that had he dismissed the man he would have been charged with inhumanly murdering him. After that he was not able to bring his courage to the point of dismissing any of the old people in his bureau.²⁴ From the number of old men employed in many offices in Washington twenty years ago, it may be assumed that other high administrative officers were restrained by considerations similar to those which stayed the hand of the Commissioner of Pensions.

THE RETIREMENT LAW. Despite our liberality in respect to pensions for soldiers and sailors and the need for a retirement system for civil employees, no retirement law for the latter was enacted until 1920. The act of that date and the important amending acts of 1926, 1930, and 1942 are here briefly summarized.²⁵

(1) All employees in the classified civil service of the United States, and several groups of unclassified employees, including permanent laborers, are brought within the retirement provisions.

(2) The retirement age is fixed at 70, 65, or 62, depending upon the nature of the work in which the employee is engaged. Employees who have served thirty years may retire at 68, 63, or 60, the age depending again upon the nature of the work. Employees may be retained in the service beyond the retirement age if their retention is authorized by the President.

(3) Each employee to whom the retirement act applies has $3\frac{1}{2}$ per cent deducted from his salary, and the government contributes an amount equal to 4 per cent of his salary. The fund thus created is appropriated for the payment of his annuity at retirement.

(4) The amount of the annuity may not exceed three fourths of the average salary received for any five consecutive years of service, and in no case may it exceed \$1,200. Employees reaching the retirement age who have served less than thirty years but as many as fifteen receive smaller annuities, depending upon the average salary and number of years of service. Employees who after five years of service become totally disabled for causes not due to vicious habits may in like manner receive annuities.

²⁴ J. T. Doyle, "The Federal Civil Service Retirement Law," *Annals of the American Acad. of Pol. and Soc. Sci.* (1924), CXIII, 334.

²⁵ U.S. Civil Service Commission, *Civil Service Preference, Retirement, and Salary Classification Laws* (1941).

(5) If an employee voluntarily leaves the service before he has reached the age of retirement, the amount he has paid into the fund, with interest at 4 per cent, is returned to him. In case of death or involuntary discharge from the service, unless upon charges of delinquency, he or his legal representative receives certain funds in addition to the amount accumulated in the individual account. It should be noted that the retirement system as here outlined is not a pension system, strictly speaking. The employees contribute from their salaries a large part of the fund from which annuities are paid.

Compensation for death or injury. In 1916 Congress passed an act authorizing compensation for federal employees killed or injured in the discharge of their duties. Civil servants or their dependents are not required to establish their claims before a court, but this must be done before an administrative body—the United States Employees' Compensation Commission.

A word for the federal employee. Perhaps the public does not fully appreciate the federal employee. He is often thought of as an individual of only moderate intelligence who has no particular ambition or initiative; who performs his work rather indifferently, not feeling the necessity of trying to outdo his fellow employee nor standing in constant fear of being "jacked up" by the boss; and who is reasonably content to work for a small salary and hopes someday to retire on a still smaller annuity. But in reply it may be said that moderate intelligence is all that is needed for the performance of most of the duties of the service, just as the great majority of positions in private business enterprise call for no more. There are positions in the civil service which call for a high degree of intelligence and professional training, and the service has had a little success in attracting capable men for such places, often for much smaller salaries than they could demand in private employment. As for ambition—not all men desire to be merchant princes, or captains of industry, or even bond salesmen. Some have the ambition to serve the public as its employees. Concerning the reputed indifference of the federal employee, it may be said that those accustomed to the hustle of private business may mistake the calm of the civil service for lack of interest. But, granting that there is some basis for the charge, one might argue that the fundamental integrity of those in the classified service entitles them to some indulgence in other particulars. Of course the caliber of the employees should and perhaps can be improved; but even now, they are for the most part honest, industrious, and capable. Speaking of the permanent employees in the key positions in the Treasury Department, Secretary Mills declared: "Those men who receive no recognition, are never mentioned in the press, are the men to whom the country owes a great debt of gratitude and they are underpaid. There are men in the Treasury Department without whom the Treasury could not function. You never

hear of them. Their services would command greater salaries in the commercial world, very much greater salaries in some cases. They get their satisfaction out of the work performed. They go on year in and year out, working ten and twelve hours a day in order to get the job well done." ²⁶

III. THE CIVIL SERVICE IN THE STATES AND LOCAL AREAS ²⁷

It is unnecessary to spend a great deal of time on a discussion of the civil service in the states and their local subdivisions, for the problem is essentially the same in every area of government. Several states now employ more than 10,000 persons each. Because of the many services performed by cities, the number of municipal employees is much larger. A city with a population of 500,000 will ordinarily have more men on its payroll than a state with four times as many inhabitants. Counties have a relatively small working force.

The extent of the merit system. The spoils system raged for years in the state and local civil service, as it did in the federal service. Indeed, the poison first spread into the federal government from some of the states, notably from New York. Civil service acts were passed in New York and Massachusetts about the same time the federal law was enacted (1883). Some twenty years later, Illinois and Wisconsin followed their example, and at the present time eighteen states ²⁸ have such laws. Of course, it is possible for a state to have something of a merit system without any law, but the chances are against it.

Practically all of the larger cities have adopted the merit system. The large number of employees and the technical nature of much of the work made this reform imperative. The counties have lagged behind, partly because they have few employees, except in urban areas, and partly because the county is usually the last stronghold of the spoilsman. In 1941 New York attracted wide attention by becoming the first state to make the merit system applicable to all counties, townships, villages, and school

²⁶ In *The Consensus* Vol. XVI, No. 4, p. 38.

²⁷ A. W. Bromage, *State Government and Administration in the United States* (1936), Ch. XV; J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930), Ch. XI; W. B. Graves, *American State Government* (1941 ed.), Ch. XI; A. F. Macdonald, *American State Government and Administration* (1940 ed.), Ch. XV; Mosher and Kingsley, *op. cit.*; W. B. Munro, *Municipal Administration* (1934), Ch. III; *National Municipal Review* and *Good Government* (current issues).

²⁸ They are Alabama, California, Colorado, Connecticut, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Rhode Island, Tennessee and Wisconsin. Kentucky, Indiana, North Carolina, Pennsylvania, and one or two other states have installed merit systems for some departments. Legislatures in their biennial sessions usually pass upon some question or problem relating to the civil service. For example, in the session of 1943 several legislatures granted preference in civil service to veterans of the Second World War, an act of generosity which has its commendable features, but which is not likely to improve the civil service.

districts. A few other states have general civil service laws for local governments but none of them approach the complete coverage provided for in the Empire State.²⁹

Formal adoption of the merit system does not necessarily mean that it is actually established. Politicians are forever finding short cuts to jobs for their friends, through securing the appointment of "reasonable" civil service commissioners, or by other means. Not infrequently the civil service laws are repealed, as in Arkansas (1939), and New Mexico (1941). Even those states which seek to protect the system by constitutional provision are not safe. The Michigan civil service law of 1937 rested upon a constitutional amendment, but that did not prevent the repeal of a number of its most excellent provisions (1939). The basic reason for the slow progress of the merit system is that the public is not decidedly averse to spoils. Often one hears heated denunciation of "politics" in the public service. It usually develops that a good Republican or an equally good Democrat is venting his spleen at an administration of the other party. Only when partisans criticize their own party for corrupting the civil service is there evidence of sincere devotion to the merit system. Long ago the American public discarded its tolerance in the matter of the political selection and removal of school teachers. This would seem to indicate that the people could have the merit principle in operation in all lines of administrative activity if they really wanted it. It may be said, however, that the public is being slowly awakened to the necessity for improving personnel standards in the public service, and that, despite a number of instances of back-sliding on the part of states and local communities which have adopted merit system laws, the general program for an improved civil service has distinctly advanced, particularly since 1935. Of particular significance in this connection is an amendment of 1939 to the Federal Social Security Act. This amendment requires all states to place their unemployment insurance and public assistance employees under the merit system. If the administration of these services is substantially improved, there is every reason to hope that the public demand for state-wide merit system laws will become insistent.³⁰

Operation of the civil service laws. Civil service commissions in the various states and local areas perform, in general, functions similar to those discharged by the national commission. However, these commissions have not as a rule attained the high standard set by the federal com-

²⁹ The progress of the merit system can be followed by reference to current issues of the *National Municipal Review* and *Good Government*.

³⁰ In connection with the improvements in state personnel administration as a result of federal pressure it might be worth while to note, on the other hand, that there is some complaint among state personnel officers to the effect that the federal service operates as a bit of a drain upon the state service. State authorities, some of them at least, say that the federal civil service steadily, if slowly, draws from the states some of the best state administrators and employees. If this is true, it is probably because of the wider opportunities in the federal service, its prestige, and stability.

mission. All too often they have been under political domination, striving to do the will of the appointing officer rather than to enforce the merit principles faithfully.

It seems that the state and local governments are unable to recruit for this service persons with as good qualifications as those who enter the federal service. This is due to various factors, among which may be mentioned the prestige of the federal service and its relative freedom from political interference.

Salaries in the states and cities are often inequitable. "Equal pay for equal work" is still a goal to be attained in many jurisdictions. Labor is usually better paid than the clerical and scientific forces; for powerful local labor organizations see to it that laborers in the public service receive the "going rate." Satisfactory salary adjustments depend upon scientific classification of positions. While a number of studies of classification or standardization have been made, the results of such studies have not been put into effect as rapidly as the needs require, and where reclassifications have been made there is always considerable difficulty in maintaining them against interested persons who present "special cases."

Promotion is based upon seniority, efficiency ratings, promotional examinations, or the discretion of the administrative officer—usually upon a combination of these. All too often the opinion prevails that only a political "pull" will bring a promotion, and in many cases there is enough basis for this opinion to discourage the civil service reformer as well as the capable employee who waits in vain for his promotion.

Discipline is imposed in a number of forms—deprivation of seniority, demerits, suspension, and others. The method of removal varies in form from removal at the discretion of a high administrative officer, as in the federal service, to removal upon the initiative of such officers, subject to the right of the employee to a judicial review. There is some dispute as to what form of removal best secures the interest of the employee and the public. The weight of authority seems to be on the side of the federal system, although it is conceded that more attention to recruitment might well lead to additional protection of the employee against removal.

As for retirement or pension systems, a number of our governments have in the last twenty years adopted some kind of plan. A few have liberal plans; but more commonly, and perhaps properly, the annuity falls somewhat below this standard.

Training for public service. We close this chapter on government employees with a brief discussion of one of the chief causes of their failure to meet and attain the best standards—the lack of adequate training *for* and *in* the civil service.³¹ We have concerned ourselves too much with giving

³¹ Earl Brooks, *In-Service Training for Federal Employees* (1938); G. A. Graham, *Education for Public Administration* (1941); M. B. Lambie, *Training for the Public Service* (1935); Mosher and Kingsley, *op. cit.*, Ch. XIV; L. D. White, *Government Career Service* (1935); J. E. Devine, *Post-Entry Training in the Federal Service* (1935).

examinations to those who appeared to take them, and too little with preparing men and women for the service. We have under government operation training schools for soldiers and sailors, but prospective civilian public employees are left to get their training in high schools, colleges, and universities, from correspondence schools and "cramming institutes." The college and university training of doctors, lawyers, engineers, and other technical and professional men for careers in the public service is reasonably satisfactory, although such training is not usually influenced by the fact that many of these men will enter that service. Pre-entry training for government administrators was given but little attention before 1933. The New Deal seemed to reveal a shortage in qualified administrators and a number of other universities joined the pioneers in offering courses designed to prepare young men and women for administrative work. Some institutions emphasize the British idea that a broad liberal education is the best pre-entry training and maintain that men with flexible minds and breadth of vision will learn the science of administration after they enter the service. Others hold that the "science" of administration can be taught to carefully picked graduate students. Perhaps there is room for training in both directions, and it might be said that institutions which admit only graduates for instruction in the science of public administration achieve this double objective. At any rate, colleges and universities now show, in striking contrast to their attitude thirty years ago, a very lively interest in encouraging young people to prepare for careers in the public service. Before leaving the question of pre-entry training, mention should be made of the National Institute of Public Affairs, which annually selects a small number of college graduates for internships in the departments in Washington. Note should also be taken of the fact that a number of educational institutions have arranged with state and local authorities for brief internships for promising students. For example, since 1937, Wisconsin has authorized its executives to hire, through the Civil Service Commission, highly qualified college seniors and graduate students to serve as apprentices in the departments, and it is reported that the plan operates very successfully.

However satisfactory the pre-entry training may be (and there is still much room for its improvement and expansion), post-entry training, direction as to how knowledge may be applied to concrete and specific duties to be performed in particular government services, is imperatively demanded if there is to be efficiency and economy in those services. Mosher and Kingsley give special attention to this problem, showing what has been done to solve it and what ought to be done before it may be said that a relatively satisfactory program of training is in operation.³² They emphasize the necessity of selecting trainers who do not lose themselves in details and who appreciate the relation of theory and broad treatment to

³² *Op. cit.*, pp. 279 ff.

practical problems. Post-entry training should begin on the day the new employees are inducted into the service, and a number of agencies can now be found which do not neglect the inductees. The Social Security Board has arranged for a series of orientation lectures for all new employees; another federal agency supplies its inductees with a handbook entitled *Your Job and the Farm Credit Administration*; and the Department of Taxation and Finance in the State of New York issues a *Departmental Code of Ethics and Official Rules and Regulations*. This kind of attention to those entering the public service helps to make them feel at home and starts building their morale, without which there can be no energetic and alert civil service.

Apprenticeship or internship is a phase of the induction program. Apprenticeship is the term used in reference to training for the skilled trades. It is unusual in the public service, although the Government Printing Office, the Tennessee Valley Authority, and a few other agencies maintain such programs. Internship is the term used rather loosely to designate the training course for those who are entering the professional fields of administration, such as accounting, personnel, and engineering. Here again T.V.A. is one of the pioneers, and so was the Rural Electrification Administration, now inactive as a result of the war emergency. Various administrative agencies, national, state, and local, have established "vestibule schools" in which employees are trained before they are assigned to duty. The public is not unfamiliar with the intensive training provided by the Department of Justice for the G-men. The Treasury Department trains its revenue agents and the State Department its foreign service officers. Nearly all the states having police forces have followed the lead of New York and established fairly satisfactory training courses for these officers, but Maryland seems to be about the only state which has a general program for training its employees. Many cities have satisfactory training courses for policemen and firemen, but instruction for other municipal employees is usually haphazard or in the embryonic stage. Beyond this vestibule training, employees need further training on the job; and later, further training for promotion; and always more training and education to prevent them from getting into a rut and to keep up their morale. Of training and development there should be no end. Only a few government agencies have comprehensive training programs aimed at the improvement of their personnel from the time of induction to the period of full maturity in the service. Perhaps the Department of Agriculture with its graduate school approaches this ideal. The most encouraging feature in the movement for post-entry training is not the extent and effectiveness of present programs, but rather the fact that in recent years government officials as well as professors of public administration have become conscious of the need for it.

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Government Finance



Preceding chapters have dealt with constitutions, civil rights, electoral processes, executives, legislatures, courts, and administrative organization and personnel. In them, the chief concern was with the powers, structure, and procedure of government. However, the functions of government were touched upon at certain points; for example, the protection of personal and property rights, in Chapter 5; the administration of justice, in Chapters 16 and 17; and foreign affairs and the postal service, in Chapter 18. But in the remaining chapters, the purpose is to consider functions exclusively, concentrating upon government activities relating to such important matters as finance, commerce, business, labor, agriculture, safety, health, social security, and war.

Government finance—national, state, and local—the subject of the present chapter, is naturally a matter of transcendent importance. It is tied up with every phase of government activity. It is the function upon which all other functions depend. For what purposes shall a government appropriate money? From what sources shall the revenue be drawn? When and to what extent should public debts be incurred? How should the currency be regulated? What should be done to stop bank failures? These and many other questions arise under the general title of government finance. Here, as in most cases, there are powerful conflicting and often selfish interests harassing our legislators and adding more confusion to problems already seething with complexities.

I. LIMITATIONS UPON THE POWER OF CONGRESS TO TAX ¹

The first clause in section 8, Article I, of the Constitution gives Congress the power "to lay and collect taxes, duties, imposts,² and excises, to pay the debts and provide for the common defense and general welfare of the

¹ Walter F. Dodd, *Cases and Materials on Constitutional Law* (1941 ed.), pp. 451-486; J. M. Mathews, *The American Constitutional System* (1940 ed.), Ch. XVI; W. W. Willoughby, *Principles of the Constitutional Law of the United States* (1930 ed.), Chs. XXXVI-XXXVII.

² "Imposts" are duties on imported goods. "Duties" are ordinarily understood to include both import and export duties. Since another section of the Constitution prohibits export duties, the term "duties" in the clause quoted above is without significance.

United States." Before examining the very wide taxing power which this clause conveys, we should note that it is subject to certain limitations.

1. Duties, imposts, and excises must be uniform. One of the limitations on the power of Congress to lay taxes is laid down in the same clause in which the taxing power is granted. It reads: "but all duties, imposts, and excises shall be uniform throughout the United States." This means, for example, that the duty or tariff on coffee shall be the same at the port of New York as at the port of San Francisco, and that the federal excise tax on a pack of cigarettes shall be the same in Maine and New Mexico. Is the uniformity rule violated when American citizens who own foreign-built pleasure yachts are required to pay an excise upon their use, while their fellow citizens who own domestic yachts are not so taxed? The courts have held that this does not violate the rule, since foreign-built yachts are uniformly taxed and domestic yachts are uniformly taxed.³ An act of Congress provided that those who paid federal inheritance taxes should have a part of such tax refunded if the states in which they lived also imposed an inheritance tax.⁴ This act was attacked as being in contravention to the uniformity clause, since those living in states with no inheritance tax law would pay a higher federal inheritance tax than those who resided in states having such a law. But the Supreme Court held that the act did no violence to the uniformity principle; that the rule of liability to pay the tax was the same in all parts of the United States.⁴ From these illustrations we reach the conclusion that persons and property may be classified, very strictly classified, for levies of duties, imposts, and excises, and that as long as the tax falls with equal force upon all persons within a class or all property within a class it is uniform within the meaning of the constitutional requirement. Thus, an inheritance of \$50,000 may be taxed at a higher rate than an inheritance of half that amount, since persons are classified according to the amount of the inheritance. Similarly, a five-dollar tax might be imposed upon the use of each motor car of a given class, while the use of those in another class might be taxed at a lower rate or not at all.

2. Direct taxes must be apportioned according to population. What has been said respecting uniformity applies only to indirect taxes and to taxes on incomes. Direct taxes must be apportioned among the states according to their population.⁵ What are direct and what are indirect taxes? The terms are not defined in the Constitution, but the courts have made the distinction. A direct tax is a capitation tax (so much per individual), a tax on land, or a general property tax. A tax on income from certain sources is also held to be a direct tax. This tax stands in a class to itself and will be discussed presently. Among the indirect taxes

³ *Billings v. U.S.* 232 U.S. 261 (1914).

⁴ *Florida v. Mellon*, 273 U.S. 12 (1927).

⁵ Constitution, Art. I, sec. 1, cl. 3.

may be mentioned import duties, the inheritance tax, taxes on various specific articles, on occupations, on theater tickets, and on playing cards. If Congress lays a direct tax, it must decide how much revenue it wants from it and then divide the amount among the states according to population. A state with one twentieth of the total population, regardless of its wealth or lack of it, will have to pay one twentieth of the tax. Congress has levied direct taxes only a few times and not at all since the Civil War. The indirect tax, which needs only be uniform throughout the United States, is much simpler to levy and collect, more satisfactory as a source of revenue, and distributes the tax burden more fairly.

THE INCOME TAX. It was just observed that the income tax stands in a class to itself. During the Civil War the first income tax was levied, and, since it was generally understood at that time to be an indirect tax, Congress did not apportion it among the states according to population. The Supreme Court upheld the validity of this tax.⁶ In 1894 Congress passed a much more comprehensive income tax law. While the Civil War measure had been applied only to incomes from salaries and wages, the new law levied taxes on incomes from practically all sources, lands and personal property included. No time was lost in contesting the validity of this act before the Supreme Court. After the Court had heard the case argued twice, it decided, five to four, that such sections of the law as applied to incomes from real and personal property were void, and that, with the provisions relating to these two important classes stricken out, the entire law should be held void.⁷ This decision was greeted with inordinate praise by large property holders and conservatives, and with intense condemnation from other quarters. A movement was set on foot for a constitutional amendment, which was finally adopted in 1913, eighteen years after the decision. The Sixteenth Amendment reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." The tax on incomes from real and personal property remains a direct tax, under the memorable decision just mentioned; but the Amendment authorizes its levy and collection as an indirect tax. That is, it is subject only to the uniformity limitation. Persons in a few states in which most of the wealth of the country is located pay 90 per cent of the income taxes, but no one can raise an objection that has legal validity. Much higher rates are levied upon large incomes than upon small incomes. If the tax applies equally to all persons in each income class, it is valid.

3. Revenue laws shall not favor ports of one state over those of another. A third limitation on the taxing power is that "no preference shall be given by any regulation of commerce or revenue to the ports of one state

⁶ *Springer v. U.S.*, 102 U.S. 586 (1881).

⁷ *Pollock v. Farmers' Loan, etc.*, 158 U.S. 601 (1895).

over those of another.”⁸ So far as this clause restricts Congress in the enactment of revenue measures, it supplements the requirement that all duties, imposts, and excises shall be uniform throughout the United States. The “no preference” restriction is not interpreted to mean that *a* port in one state shall not be given preference over *a* port in another. Such preference is shown whenever Congress makes a port in one state a “port of entry” and refuses to make another port in another state a port of entry. What is forbidden is discrimination against the ports of one state or of several states.⁹

4. **Interstate duties prohibited.** The clause containing the “no preference” restriction also provides that vessels bound to, or from, one state, shall not be required to enter, clear, or pay duties in another. It is not likely that Congress would ever establish trade barriers between the states, by duties or otherwise, even if there were no such prohibition in the Constitution.

5. **Export duties prohibited.** A more important limitation than either of the last two mentioned is the prohibition that “no tax or duty shall be laid on articles exported from any state.”¹⁰ It will be recalled that this provision was included in the Constitution because the Southern delegates at the Philadelphia Convention were afraid Congress might levy an export duty on raw materials—the principal products of the Southern states. This clause lays the only positive prohibition upon the power of Congress to tax. The other restrictions are limitations, not upon the power of taxation, but upon the manner of its exercise. For example, Congress may levy direct taxes to any amount, but they must be apportioned according to the population of the states. Coming now to the meaning of the export prohibition, we find that the word “exports” applies only to articles shipped to foreign countries. Congress is not only prohibited from laying a duty on such articles, but it is also held to be prohibited from imposing a stamp tax on foreign bills of lading, a stamp tax upon charter parties for the carriage of cargo to foreign ports, and a similar tax upon marine insurance policies covering exported goods. On the other hand, it is held that the requirement that all packages of tobacco intended for export be stamped, the object being to prevent fraud, is not an export tax. A general tax which falls upon all property alike and which just happens to hit some property intended for exportation is a valid tax, despite the intent of exportation. It is held also that the income tax is valid as applied to the incomes of exporters. What is prohibited is the singling out and taxing of articles intended for export and the taxing of export transactions. General taxes, taxes which do not lay a special

⁸ Constitution, Art. I, sec. 9, cl. 6.

⁹ *Pennsylvania v. Wheeling, etc.*, 18 Howard 421 (1855).

¹⁰ Constitution, Art. I, sec. 9, cl. 5.

or direct burden upon exports, are not within the prohibition under discussion.¹¹

6. The implied prohibition. There is one other prohibition upon the power of Congress to tax. It is not mentioned in the Constitution. It is implied from the nature of our federal system of government. The Constitution contemplates two governments, the national and the state, each supreme in its own sphere. Following this line of reasoning, the Supreme Court early held that a state was not permitted to tax the national government or its instrumentalities. At a later date, it declared that the same prohibition saved the states and their instrumentalities from being taxed by Congress. This point was discussed at some length in Chapter 3, section 1.

7. A tax must not violate due process. A general limitation upon the powers of Congress, which therefore applies to tax legislation, is imposed by the Fifth Amendment in the provision that no person shall be deprived of life, liberty or property, without due process of law. A tax levied upon property which for the purposes of taxation is not located within the jurisdiction of the government, is invalid. Similarly, a tax imposed to secure revenues for a purely private purpose is invalid. The taxing power must be exercised for a public purpose. Nor may the public purpose be a demoralizing one.

Breadth of the taxing power: 1. **TAXATION FOR THE GENERAL WELFARE.** Congress is authorized to levy taxes "to pay the debts and provide for the common defense and general welfare of the United States." Notice that Congress is empowered to levy taxes for the general welfare. It is not, however, authorized to legislate for the general welfare. The power to tax and to appropriate money is thus broader than the power to legislate. Congress has appropriated money to the states for various purposes; often for projects over which Congress has hardly a shadow of legislative power. The money is commonly granted to the state subject to conditions. The meeting of these conditions by the states means, of course, that the national government secures, in effect, legislative control over the objects for which appropriations are made. This subject was discussed in Chapter 3, section iv. Other appropriations for objects over which Congress is given no clear legislative powers include grants for the relief of earthquake, drought, and flood sufferers in this country and abroad, and for the promotion of world's fairs.

2. **REGULATION.** There is not the slightest question concerning the power of Congress to tax for revenue; but an important question, not entirely settled, arises over the authority of that body to use the taxing power for other than revenue purposes. Tariffs have been enacted for

¹¹ *The Constitution of the United States as Amended to Dec. 1, 1924* (annotated), pp. 264-266.

many years with the avowed purpose of protecting American products, revenue being only an incidental consideration or no consideration at all. There are very few whose objection to the protective tariff rests on the claim that it is an unconstitutional use of the revenue power. This argument is no longer taken seriously. It might be added that Congress could restrict importations directly through its power to control foreign commerce. This being so, there is no reason why it should not be permitted to accomplish the same purpose indirectly through the taxing power. In 1866 Congress levied a 10 per cent tax upon the circulating notes of state banks (private banks chartered by the states). This tax was contested as being excessive and as having been levied for the purpose of driving such notes out of circulation. The Supreme Court held that the high rate of the tax did not render it unconstitutional. It laid special stress upon the fact that, since Congress had the authority to regulate the national currency, there could be no valid legal objection to the act of Congress which sought to accomplish this end indirectly through the medium of the taxing power.¹²

But, can Congress accomplish, through its taxing power alone, a purpose it has no authority to accomplish through any other provision of the Constitution? In other words, may Congress, under the guise of the taxing power, pass restrictive and prohibitive measures on subjects not committed to its authority by the Constitution? The answer is "Yes," up to a certain point. It has been done a number of times. In order to discourage butter substitutes, Congress taxed yellow oleomargine 10 cents per pound. The Court held that the motive to discourage the sale or manufacture of one article over another did not invalidate the tax. Opium has been made the object of a very high tax, and the tax provision is accompanied by regulations respecting its sale and distribution. The tax was sustained in spite of the regulations, these being held to be reasonably related to the enforcement of the tax.

The limit of this principle. Having failed to receive judicial support in its attempt to restrict child labor through the use of its power over interstate commerce, and being encouraged by the liberality with which the Court had upheld its use of the taxing power, Congress made an effort to apply this power for the purpose of discouraging the employment of children in industry. The act provided that those who knowingly employed children under specified ages in mines, mills, and similar industrial establishments, should pay, in addition to all other taxes, an excise of 10 per cent on all net profits. Observe that the excise was made the same, regardless of what percentage the number of children employed might be of the whole number of employees. This, coupled with the word "knowingly," led the Court to hold the act void. The tax was not a tax, said

¹² *Veazie Bank v. Fenno*, 8 Wallace 533 (1869).

the Court, but a penalty designed to restrict the employment of children.¹³

The Agricultural Adjustment Act of 1933 provided for a processing tax, the revenues from which were to go to farmers who agreed to limit their production of certain commodities. There was no question of the power of Congress to impose this tax. The question arose over the spending of the money. Could it not be spent for the "general welfare"—the improvement of the lot of the farmers? The Supreme Court of the United States did not meet the question from this angle, but held that Congress in *spending* money for the purpose of *regulating* agricultural production, a regulation it had no power to exercise through its *legislative* power, was encroaching upon the reserved powers (Tenth Amendment) of the states.¹⁴ The six judges who gave this decision did not deny the right of Congress to levy the tax or to spend the money. The spending of the money for a regulatory purpose was the basis of their objection. But Justice Stone, in a vigorous dissent for the minority, said that "the power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control." He gave a number of examples of such persuasion. As he saw it, the majority decision led to "absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed, or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even to use it to support their families . . . All that, because it is purchased regulation infringing state powers, must be left for the states, who are unable or unwilling to supply the necessary relief."

In view of this dissent in the Court and a wide-spread dissent outside of the Court, it can not be said that the question of the power of congress to regulate through spending has been definitely settled. There seems to be no doubt, however, that the Court will take a liberal view of the power of Congress to spend for the "general welfare." In 1937 Justice Cardozo, in upholding old age benefits under the Social Security Act, stated that it was necessary to distinguish between one welfare and another, between a particular welfare and the general welfare; and the discretion of Congress in this matter would not be disturbed by the Court unless Congress acted arbitrarily.¹⁵

II. THE SOURCES OF NATIONAL REVENUE AND THE OBJECTS OF EXPENDITURES ¹⁶

The government of the United States collects and expends funds of colossal proportions. A century ago a few million dollars was sufficient

¹³ *Bailey v. Drexel Furniture Company*, 259 U.S. 20 (1922).

¹⁴ *United States v. Butler*, 297 U.S. 1 (1936).

¹⁵ *Helvering v. Davis*, 301 U.S. 619.

¹⁶ *Annual Reports of the Secretary of the Treasury*.

to keep the national government's machinery in motion for a year. In 1900 more than half a billion was required; in the 'twenties the amount fluctuated around the four billion mark; and since 1933 the expenditures and revenues, the latter running considerably behind the former, have continued to rise. With the launching of our national defense program and our entrance into the Second World War came the fiscal skyrocket, expenditures for 1943 being estimated at about \$100,000,000,000 and revenues at somewhere about a fourth of that amount.

Sources of revenue: CUSTOMS RECEIPTS. These constitute a small source of revenue and internal revenues the large source. Until the Civil War the national government relied chiefly upon its customs receipts. As late as the nineteen 'twenties this source was substantial, but by no means the main source, representing only about one seventh of the total revenue. The depression years cut the amount in half, to approximately \$300,000,000 per annum, where it still is, constituting hardly a "drop in the bucket" of the total revenue.

INTERNAL REVENUE. Excise taxes, levies on the manufacture, sale, and use of various articles, provide a fairly tidy sum for the national government. The excise law of 1791 which laid a tax upon distilled liquors and which provoked an uprising in western Pennsylvania is the best known of the earlier excise taxes. In 1797 the first estate tax was levied. This tax, commonly called an inheritance tax, is an excise upon the transmission of property at the death of the owner. Since the Civil War Congress has made steady use of the power to levy excises. The estate, liquor, tobacco, and manufacturers' and retailers' excise taxes yielded approximately \$4,000,000,000 in 1942. Naturally, in time of war the excise taxes are levied at a higher rate and many privileges and transactions other than those mentioned are made subject to such taxes.

INCOME TAXES. The internal revenue "jack pot" is the corporation and individual income tax. During the First World War this source yielded some \$4,000,000,000 annually. It was soon reduced, however, and did not reach that figure again until we were about to plunge into the second world struggle. Persons on relatively small incomes are now on the list of federal income tax payers, and the rates are steeply graduated so as to recover for the government the major part of the larger incomes. It is estimated that the Revenue Bill of 1942 increased the number of individual income tax payers from about 22,000,000 to around 40,000,000. The so-called Victory tax (5 per cent to be deducted from all wages and salaries in excess of \$12 a week) added several more millions to the list. This bill (1942) increased the rates to the point where an individual with a wife and two dependent children would pay about \$200 in taxes on a \$2,500 income and \$900,000 or 90 per cent on \$1,000,000 income. Corporation income taxes were also increased, running as high as 80 per cent for the most profitable enterprises. An estimate of the revenue for 1943 is \$26,000,000,000

of which approximately three fourths comes from income taxes.

Staggering as these totals are, they are not enough. We should be paying \$35- or \$40,000,000,000 in federal taxes. It can be done with relative ease because the national income is well over the hundred billion mark and because that income is perhaps \$25- or \$30,000,000,000 in excess of the goods and services available for purchase. This surplus income, or the greater part of it, should be paid into the federal treasury in taxes. If the receivers of this income surplus retain it, the greater part of it will be spent for goods which are rapidly growing more scarce. And if it is used to purchase scarce goods, prices will rise to such an extent that those who spent the extra dollars will simply lose them in the higher prices. If, on the other hand, the federal government takes up the surplus in taxes, the national debt will be kept lower, and there will be practically no inflation. In this latter case both the citizens and the government will be better off. The man on the street does not understand this because he thinks only in terms of dollars; seldom in terms of what dollars will buy. It is believed, however, that this could be explained to the average decent American so that he could understand it and be willing to pay higher taxes than he is now paying. If the government should keep inflation to the minimum by taking the surplus dollar, it might get through the present struggle without incurring a debt beyond, say, \$300,000,000,000. If it should be too timid to take up the surplus dollar, then the debt at the end of the war could easily be double the amount suggested. Then in the days of reconstruction there would be the grave threat of even more inflation.

The pay-as-you-go tax plan, which went into effect July 1, 1943, represents an interesting experiment in the collection of income taxes. Formerly, we were always a year behind in paying these taxes, making tax payments in one year on incomes we had earned the previous year. The new plan provides that taxes shall be paid as the income is being earned. Taxes on wages and salaries are now deducted from payrolls, and those whose income is from other sources must estimate those incomes for the current year and make tax payments accordingly. At the end of the year a final tax return is filed and the individual pays the Government any balance that may be due, or the government pays him any amount he may have over-paid. In changing over from the one-year lag to pay-as-you-go it was necessary to make some adjustment respecting existing tax obligations. Otherwise taxpayers would have to carry a double burden in one year. The adjustment worked out by Congress abated the income taxes for 1942 of all persons whose tax obligation was fifty dollars or less. All others were allowed a seventy-five per cent abatement. The plan marks a step in the direction of the realization that, as far as possible, the war should be paid for out of current income, and it makes more certain the collection of taxes due. It does not, however, put the tax rates high enough to pay a large fraction of the cost of the war from current income,

and, as it still leaves in our pockets plenty of dollars to spend, it fails to meet effectively the threat of inflation.

Collection and custody of government funds. Customs duties are collected by officers of the Bureau of Customs at the three hundred odd "ports of entry" located along the Atlantic and the Pacific and the boundaries of Canada and Mexico. The greater part of the internal revenue is collected by officers of the Bureau of Internal Revenue who are stationed at convenient points throughout the United States. Miscellaneous funds of the type mentioned in the preceding paragraph are collected by the appropriate government units in the ordinary course of their work. The federal funds are stored in vaults at Washington, in the twelve federal reserve banks, and in national banks which meet the requirements of depositories as laid down by the Treasury Department.

National expenditures. Where does the money go? Much of it is appropriated for the maintenance of the Army and the Navy, for pensions and the care of veterans, and for payments on the public debt, interest and principal. Prior to 1933, about 70 per cent of all appropriations were for these purposes. But, beginning with that date, the Congress has annually appropriated several billions for relief and recovery enterprises, spending amounts approximating those it voted for the conduct of the war (1917-18) with the Central Powers. Relatively insignificant amounts are appropriated for Congress, the Executive Office, and the executive departments and services not mentioned above. Practically all of the federal revenues are now being used for war, and this will be true for years to come. The annual interest on a war debt of \$300,000,000,000 would probably be about \$10,000,000,000.

Deficits and borrowing. Congress has the power "to borrow money on the credit of the United States." In normal times, the ordinary expenses of the government are paid from its income, and there have been years in which a surplus was left in the Treasury. But when a great project which will have lasting benefit is being carried through, it is good business to borrow and thus spread the cost over a number of years, allowing those who enjoy the benefit to pay for it. Money must be borrowed to conduct a war, whether the question of permanent benefit is answered affirmatively or negatively, for war costs too much to be a "pay as you go" affair. During the First World War, in spite of the fact that taxes were levied at very high rates, Congress found it necessary to increase our national debt from about \$2,000,000,000 to \$25,500,000,000. More than a third of this had been repaid before the financial reverses of the 'thirties. Making war on the depression, the government borrowed colossal sums, increasing the debt to approximately \$42,000,000,000. Then came the Second World War. What the national debt will be at its close is anybody's guess—\$2-, \$3-, \$400,000,000,000—and depends upon the length of the war and also upon the government's tax policy and other means of controlling inflation.

The government ordinarily borrows through an issue of bonds. These are purchased as investments by private individuals, general business concerns, and particularly by insurance companies and banks. In times of emergency, notably in time of war, the sale of bonds is stimulated by appeals to patriotism as well as to business motives. When the country is engaged in war, practically every surplus dollar (every dollar the citizen need not spend) should go into government bonds. A dollar which goes into a bond, like the dollar the government absorbs in taxes, is another dollar taken out of the market as a competitor for scarce goods. It is one more dollar taken out of the trend toward inflation. It is true that the government can borrow all the money that it needs from banks. It is equally true that the government could simply print all the money it wants. But when the government prints money, or when it borrows money from banks (except when it borrows from the people's savings in the banks) it is creating more money and thus causing inflation. On the other hand, when it borrows from the incomes of citizens, it simply transfers purchasing power from them to itself, and thus gets money to finance the war without causing inflation. Taxation and citizen bond-buying are twin virtues in financing a war. When governments neglect them and seek easy methods of getting dollars they are headed for inflation troubles, troubles which the dullest citizens will recognize when it is too late.

III. REVENUE AND APPROPRIATION BILLS ¹⁷

Revenue bills. The Constitution states that all revenue bills shall originate in the House of Representatives. It has already been pointed out that, since the Senate may amend such a bill to the point of producing an entirely new bill, this requirement amounts to little in practice. Whether the House or the Senate is the dominant body in preparing a revenue bill depends upon which house has the greater interest and initiative at the time. The Ways and Means Committee in the House, and the Finance Committee in the Senate, perhaps the most important legislative committees, are in charge of the preparation of all revenue bills. Under ordinary circumstances, the minority party members of these committees are given scant consideration by the majority; but in times of emergency, partisan politics may be laid aside temporarily and a fair degree of co-operation may be obtained.

Directing our attention to the House Committee, we find that it receives advice and suggestions from all quarters, particularly and properly from

¹⁷ J. P. Larkin, *Trade Agreements: A Study in Democratic Methods* (1940); E. E. Naylor, *The Federal Budget System in Operation* (1941); T. W. Page, *Making the Tariff in the United States* (1924); D. T. Selko, *The Federal Financial System* (1940); F. W. Taussig, "The Tariff Act of 1930," *Quarterly Journal of Economics*, XLV, 1-21; W. F. Willoughby, *The National Budget System* (1927); J. M. Pfiffner, *Public Administration* (1935), Chs. XIV-XV.

the Secretary of the Treasury, the President, and the Speaker. Some one advocates a higher rate of tax on big incomes; another, an income tax that will include the small incomes; another, a sales tax; another proposes revenues from undivided profits. The Committee adopts this, discards that, lays something else aside for future consideration, and then may decide to start all over again. The press of the country gives full publicity to the progress of the Committee, as far as it is available. The Committee watches the press in order to learn the reaction of the public to the facts reported and the rumors discussed, for he is a rare congressman who does not heed the voting public.¹⁸ Working often in small groups or subcommittees, holding hearings, conferring among themselves, meeting members of the Senate Finance Committee for informal discussion, receiving an urgent suggestion from the President or the Speaker, the Committee on Ways and Means finally has its bill ready for the House. Here it is debated, amended, and, in the course of time, adopted. Then the bill must pass through the Senate Finance Committee and the whole body of senators. It is almost certain to receive many amendments, and it is returned to the House, where these amendments must be considered. If the House fails to approve all of the amendments, then a "conference" is arranged between members of the two Houses, as described under congressional procedure. The time is short now, and the agreement reached by the conference is quite likely to receive formal approval in both Houses. However dissatisfied the President may be with the revenue bill, he signs it; for the government must have money on which to operate and private business can proceed with more certainty when the revenue bill becomes a law.

The tariff. General tariff bills, enacted every six or eight years, depending upon business and political conditions, are designed to encourage American industry as well as to produce revenue. While the procedure of enacting a tariff law is essentially the same as that followed in the enactment of any other revenue bill, it seems that the Senate ordinarily plays the dominant role. This may be due to the fact that the long terms of senators better enable them to familiarize themselves with the admitted intricacies of the tariff. Be that as it may, the senators, rather than the

¹⁸ It is not often that a congressman feels free to take the bold stand assumed by Charles R. Crisp, Acting Chairman of the Ways and Means Committee, in February, 1932. "I have burned every bridge behind me," he declared, in a speech in the House. "No matter what the personal political consequences may be, I'm going to advocate levying sufficient taxes to balance the budget. It means nothing to the United States whether I remain in Congress or not, but it means much to the United States government that its honor, its credit, its security be maintained at par. . . . I want you and the country to gird yourselves with stamina, with backbone and with courage to meet this emergency. All must make tremendous sacrifices. For the budget must be balanced either through a manufacturers' sale tax or excise taxes on commodities and industries." *Time*, Feb. 22, 1932, p. 15.

representatives, are commonly thought of as tariff experts.¹⁹ As a matter of fact, the problem is so complicated and so confused by the aggressive claims of selfish interests and the exigencies of politics that there are few in either House who have anything approaching a mastery of the subject. This being so, congressmen often let a few of their powerful constituents tell them what to put in a tariff bill. It is in the framing of such bills that the lobby is most active and pernicious.

The Tariff Commission and the flexible tariff. The tariff is one of the most technical and difficult problems with which Congress has to deal. It is not surprising, therefore, that Congress, in 1916, created the Tariff Commission and delegated to it the power to make investigations and reports on such matters as the effects of the tariff laws on industry and labor, the effects of ad valorem and specific duties, tariff schedules, and tariff relations with other countries. It was hoped that a bipartisan Commission of tariff experts would take the tariff out of politics, but this hope has not been fulfilled. Bipartisan does not mean "nonpartisan," and even experts may be partisans. Furthermore, Congress has not appeared to feel under any particular obligation to act in accordance with the Commission's recommendations. Since 1922 the Commission has been charged with the duty of making another type of investigation. The tariff act of that year authorized the President to increase or decrease the rate of duty on an article by as much as 50 per cent when it was found by investigation that the difference in cost of production of such article in the United States and in the principal competing foreign country was not equalized by the rate of duty specified in the tariff law. The Commission made some investigations, but its work was slow and its recommendations the subject of much unfavorable comment. The rapid shift in economic conditions after 1929 made the "flexible" tariff practically unworkable.

Tariff agreements. Faced with rapid fluctuations in international trade conditions, President Roosevelt (1934) asked Congress for authority to make executive trade agreements with the foreign powers. After considerable debate on the subject of constitutional limitations,²⁰ Congress voted him the authority. It was hoped that this method of dealing with each nation individually and with relative celerity would result in increasing the flow of exports and imports. The Secretary of State attacked the problem with energy and a number of agreements have been made. Au-

¹⁹ The relative part played by the two Houses in framing a tariff bill, and the dimensions of the tariff problem may be illustrated by the chronology of the Hawley-Smoot Tariff Bill: House Ways and Means Committee hearings, Jan. 7 to Feb. 27, 1929; bill before the House, May 7 to May 28; Senate Finance Committee hearings, June 13 to July 18; Finance Committee redrafts bill, July 22 to Sept. 4; bill before the Senate, Sept. 12, 1929, to March 23, 1930; passed Senate March 24, with 1,253 amendments to the House bill; various conferences between House and Senate; bill finally passed, June 14, 1930. *New York Times*, June 15, 1930, p. 26.

²⁰ See the Senate speeches of Borah and Harrison, May 17, 1934.

thorities generally agree that the "trade agreement" plan is a great improvement in tariff regulation, and Congress has three times voted to extend the period for making such agreements.

Appropriation bills. The Constitution prohibits the expenditure of any public money except as appropriated by act of Congress. Appropriation bills may originate in either House; but the lower House almost invariably initiates them and usually has the greater influence in determining their final form. In the early days, when the financing of the Republic was a relatively simple matter, the Committee on Ways and Means reported both revenue and appropriation bills to the House. With the increase in national activities, each committee having charge of legislation for a particular important service—such as the Army, the Navy, and agriculture—sought and usually secured the privilege of preparing the appropriation measure for that service. The creation of the Appropriations Committee in 1865 did not alter this situation materially. About the same lack of method characterized appropriation procedure in the Senate. This arrangement was not devoid of logic, but it was very poor business. Each committee went merrily on its way, taking the recommendations made by the executive officers of the department for which it made appropriations, accepting without much question the advice of politically powerful individuals concerning the needs of a department or locality, paying little attention to what the other committees were requesting for their departments, and giving equal lack of attention to the revenue measures (with which the aggregate appropriations should balance) being prepared by the Committee on Ways and Means.

The "pork barrel" and "logrolling." This haphazard way of preparing and voting appropriations led to a pernicious system of indirect or "honest" graft. Funds in the federal treasury or to accrue to it were thought of as a barrel of pork, and each congressman was expected to get his share for his constituency, just as the head of each "darky" household in slavery times was expected to get his portion of real pork when the barrel was open in the planter's back yard. Congressmen and the leading citizens of their districts talked both seriously and jokingly of "pork," but seldom with any sense of shame. Thirty years ago, John N. Garner, then an inconspicuous representative from Texas, is reported to have said: "Every time one of these Yankees gets a ham, I'm going to do my best to get a hog."²¹ As already intimated, congressmen were not solely responsible for this attitude. They were intimidated by the political organizations in their districts, entreated by letters and personal calls from individual voters, and urgently wired by local chambers of commerce (which at the same time dolefully complained of the rising cost of government) to secure appropriations for such purposes as the erection of a local post office or other federal building, the dredging of a river, and a project of irriga-

²¹ Quoted by G. Milburn, in an article in *Harper's*, November, 1932, pp. 669-682.

tion. Regardless of whether these things were actually needed or feasible, the representative was judged in congressional campaigns by the amount of money he had obtained for his district. How was it possible for one representative or senator to get the entire Congress to vote for unnecessary expenditures in his district? That was easy. Other congressmen wanted similar things for their districts, and they supported each other's demands. This was called "logrolling," a term borrowed from the frontier, where the pioneers often joined forces in the rugged physical enterprise of rolling logs. Of course there were always some congressmen who disdained the unseemly scramble around the pork barrel and who reproached their brethren for the unworthy motives which prompted the figurative logrolling. Because of some improvement in the public conscience, but more particularly because a better system of preparing appropriation bills has been devised, the odor of the pork barrel does not fill the halls of Congress to the extent it did twenty years ago.²² Yet evidence is not wanting to show that "pork" still holds its place as a popular Congressional diet.

The Bureau of the Budget. As the cost of government increased and the call for efficiency became louder, the idea of a budget system gained support in Congress. The first budget bill, passed in 1920, was vetoed by President Wilson, not because he was opposed to the budget system (quite the contrary), but on the grounds that this particular bill unconstitutionally restricted the President's power to remove the Comptroller General.²³ But in 1921 Congress passed and President Harding approved the present Budget and Accounting Act. The provisions of this act which relate to the budget proper require the President to transmit to Congress at the beginning of each regular session: (1) estimates of the expenditures and appropriations necessary for the support of the government for the ensuing fiscal year; (2) estimates of the receipts of the government during the ensuing fiscal year, under existing revenue laws and such revenue proposals as he shall make; (3) estimates of the expenditures and receipts of the government during the fiscal year in progress; (4) a list of the expenditures and receipts of the government during the last completed fiscal year; (5) statements showing the condition of the treasury at the end of the last fiscal year and estimates of that condition for the year in progress and the ensuing year; (6) facts regarding the indebtedness of the United States; (7) and such other financial statements as he may deem necessary to give full knowledge of the financial condition of the government.

Manifestly, the President cannot personally prepare these facts and estimates for Congress. This is done by the Bureau of the Budget created by the act. This Bureau was formerly located in the Treasury Depart-

²² The Beards' *American Leviathan* (1930), pp. 178-179, contains a good account of the "pork barrel" and "logrolling."

²³ In the Humphrey case, 295 U.S. 602 (1935), it was held that Congress had the power to restrict the right of the President to remove such independent officers.

ment, but it was actually responsible only to the President, and, under a reorganization plan of 1939, it was transferred to his Executive Office. At the same time the functions of the Central Statistical Board were transferred to the Bureau of the Budget. The chief officers of the Bureau are the Director, six Assistant Directors, and the General Counsel. Under Executive order of 1939 the functions of the Bureau include the following:

"1. To assist the President in the fiscal program of the government.

"2. To supervise and control the administration of the Budget.

"3. To conduct research in the development of improved plans of administrative management, and to advise the executive departments and agencies of the Government with respect to improved administrative organization and practice.

"4. To aid the President to bring about more efficient and economical conduct of Government service.

"5. To assist the President by clearing and co-ordinating departmental advice on proposed legislation. . . .

"6. To assist in the consideration and clearance and, where necessary, in the preparation of proposed Executive orders and proclamations . . .

"7. To plan and promote the improvement, development, and co-ordination of . . . statistical services.

"8. To keep the President informed of the progress of activities by agencies of the Government with respect to work proposed, work actually initiated, and work completed, together with the relative timing of work between the several agencies of the Government; all to the end that the work programs of the several agencies . . . may be co-ordinated and that the moneys appropriated by the Congress may be expended in the most economical manner possible with the least possible overlapping and duplication of effort." ²⁴

It may appear from the foregoing that the functions of the Bureau of the Budget are not all directly related to the fiscal program of the government, but a thoughtful scrutiny of them will bring the realization that they all bear upon the matter of financial management, upon efficiency and economy in administration.

PREPARING THE BUDGET. Each department or agency of the government is required by law to have a budget officer, who, with the head of his department, must prepare the estimates for the department and submit them to the Bureau of the Budget before September 15 of each year. The Bureau is authorized to "assemble, correlate, revise, reduce or increase these estimates." One can well imagine that there is much going back and forth between departments and the Bureau of the Budget, and that there may be some irritations, and that tempers might grow thin, and that department heads might on occasion appeal to the President from a decision of the Director. An incident of this type is related by an English

²⁴ *United States Government Manual*, Fall, 1942, p. 51.

visitor. Charles G. Dawes, the first Director of the Budget, had told the Secretary of the Navy that he must reduce an item in his estimates by \$300,000: The Secretary complained to President Harding. "The next day," said Dawes, "I heard the President had agreed with the Secretary of the Navy, less \$300,000." ²⁵

When the estimates are accepted by the President (usually late in December), he transmits them to Congress (usually the next day after he has delivered his annual message to that body). The Budget is a huge volume and should be distinguished from the Budget Message which accompanies it. The estimates thus submitted are the only lawful estimates. Officers of the various departments and establishments are forbidden to appear before Congress or its committees in an attempt to secure increases over the President's estimates except at the request of either House of Congress.

Congress and the budget. A good budget system requires the co-operation of the legislative body with the executive department. What has Congress done to bring itself into line with the budget system it has established? For one thing, each House has conferred upon its Committee on Appropriations the sole authority to prepare such bills. This is a distinct improvement over the old method of allowing several different committees to bring in appropriation measures. A feature of the old system which has certain obvious advantages is retained by the Senate in the provision that the committees on Agriculture, Post Offices, Military Affairs, and some other important committees, may sit with the Committee on Appropriations when this Committee is considering appropriations for the services mentioned. When the House of Representatives receives the budget from the President, it is referred to the Committee on Appropriations, which divides itself into subcommittees in order to consider appropriations for the several activities of the government. While the President's estimates may be changed as the Committee sees fit, in practice they are not changed a great deal and the total recommended by the Committee is usually about what is requested by the President. The House may change the bills recommended by the Committee, but ordinarily it follows the Committee's lead.

The Senate and its Appropriations Committee show somewhat less restraint than the House in voting funds; but when the appropriations are finally through both Houses, the total money granted does not ordinarily vary greatly from the amount requested by the President. It would seem, therefore, that Congress has entered into the spirit of the budget program and that it has in effect imposed upon itself the obligation not to vote appropriations in excess of the President's estimates. It is still possible, of course, to distribute a little pork. This may be done by reducing or dropping an item here and increasing or adding an item there, without increasing the total amount appropriated. Despite this and certain other im-

²⁵ L. D. White, *Introduction to Public Administration* (1926 ed.), p. 112.

perfections revealed in the new estimates and appropriations system, it is a great improvement over the old.

Administering the budget. Of hardly less importance than the method of preparing and voting the budget, is the system by which expenditures of the departments are controlled after the money has been appropriated. Formerly a Comptroller of the Treasury and auditors attached to the Treasury Department performed this function, but their only duty was to pass upon the legality of expenditures. The Budget and Accounting Act of 1921 abolished the office of Comptroller of the Treasury and created an independent establishment, the General Accounting Office. This Office is headed by the Comptroller General of the United States, who is appointed by the President and the Senate for a period of fifteen years and who may not be removed except by Congress and then only for certain specified causes. The Office is thus intended to be free from executive control.

The Comptroller General was given the authority to prescribe a system of accounts for the departments and establishments, and while some progress has been made in improving departmental accounting procedures, the improvement has been along lines designed to assist the General Accounting Office rather than the President, the Treasury Department, or the Bureau of the Budget. Another function of the Office is that of settling claims by or against the United States, such settlements being made independent of the administrative departments. But the chief functions are those of accounting and auditing. Through its accounting authority the Office makes decisions as to proposed expenditures and the availability of funds. Through its auditing authority it examines and verifies accounts after the transactions have been made in order to discover any illegality or irregularity in the expenditures. Now these two functions should not be exercised by the same organization, for the control of expenditures through accounting is an executive function and should be under executive direction while auditing is for the purpose of giving Congress a check on the Executive and it is therefore a function which should be exercised free from executive control. The President's Committee on Administrative Management (1937) pointed out the anomalous situation created by the association of the two functions in the Accounting Office, and the Committee recommended that the powers to determine the use of appropriations, to settle accounts and claims, and to prescribe administrative accounting systems be transferred to the Treasury Department where they would be under executive control. The Committee maintained that, with the auditing function left in the independent Auditor General's Office (the Committee would have his title changed from Comptroller to Auditor), Congress would have proper and sufficient means for holding the administrative forces to accountability. Since the President had been frequently vexed by decisions of the Comptroller he was

more than pleased to transmit the Committee's recommendations to Congress. That body, however, was unfavorable to the proposals; and it must be added that it was supported in this attitude by some fiscal authorities hardly less eminent than those who urged the change.²⁶

Nevertheless, the administrative reorganization of 1939 has brought about a greater degree of executive control in the administration of the budget. As already explained, the Bureau of the Budget was moved to the White House establishment, and it was charged by the Executive with the duty of supervising, controlling, and *administering* the Budget. Acting through the Director of the Budget, the President requires the spending agencies of the government to submit monthly statements of amounts they propose to spend, and after approval by the Director, such monthly apportionments become the maxima which may be expended. Thus, an appropriation by Congress does not become an order to spend, but only permission to spend, subject to Executive approval. The Director may use his power to prevent excessive and wasteful expenditures and for other fiscal reasons. It is true that Executive restraints could be and were laid upon spending before 1939, but the rearrangement of that date gave more emphasis to the system. The new arrangement also places the Bureau of the Budget in a better position to perform general services in the interest of economy and efficiency, services it was always supposed to perform but did not. The reference here is to research on administrative management, the co-ordination of departmental advice on proposed legislation, the improvement and development of the statistical services, the preparation of executive orders, and advice to the President on the progress of administrative activities. In other words, the Bureau is now a part of the White House administrative staff.

IV. THE CURRENCY AND BANKING ²⁷

Congress has the power "to borrow money, . . . to coin money, regulate the value thereof, and of foreign coin."²⁸ Its power to charter and regulate banks is implied from these and other enumerated powers.²⁹

The currency. Congress may coin money and regulate its value; but the states are forbidden to coin money, emit bills of credit, or make anything but gold or silver coin a tender in payment of debts.³⁰ The states may charter banks and these banks may issue paper money, but such

²⁶ The Brookings Institution among others. See L. D. White, *Introduction to Public Administration* (1939 ed.) p. 271.

²⁷ M. B. Foster and Raymond Rodgers, *Money and Banking* (1940 ed.); E. W. Kemmerer, *The A. B. C. of the Federal Reserve System* (1938 ed.); W. B. Munro, *The Government of the United States* (1936 ed.), Ch. XXII; H. White, *Money and Banking* (1935).

²⁸ Constitution, Art I, sec. 8, cls. 2 and 5.

²⁹ See "Implied Powers," Ch. 2, sec. 1.

³⁰ Constitution, Art I, sec. 10, cl. 1.

paper money may not be used as legal tender; that is, as money which must be accepted in payment of a debt. As indicated in the first part of this chapter, Congress effectively removed state bank notes from the currency field when (1866) it placed a heavy tax upon them. From the beginning, Congress coined gold and silver, and in 1791 it chartered a national bank with the authority to issue bank notes, although such notes were not made legal tender. Under the pressure of the Civil War, however, Congress made United States notes legal tender. Not being redeemable at the Treasury in coin, the notes depreciated to less than half their face value. In 1867 the issue was attacked as unconstitutional and the Supreme Court so held. But later, with a partial change in personnel, the Supreme Court decided that the issue of the legal tender notes was valid, basing its decision primarily upon the theory that the issue was a reasonable method of financing the war.⁸¹

Congress reissued the legal tender notes or "greenbacks," as they were commonly called, after the war emergency had passed. The authority to do so could no longer be found in the exigencies of war; but, in 1884, the Supreme Court held that Congress could issue legal tender notes, even in time of peace, under authority implied from its general power over finance.⁸²

The gold standard. During the greater part of our history gold and silver were coined independently. From the 'seventies until 1900 there was a very strong movement for the coinage of silver and gold at a fixed ratio. Bryan proposed a ratio of 16 to 1 and went down to defeat. From 1896 until 1933 we were thoroughly committed to the gold standard. To be sure, silver and various types of paper money constituted the chief media of circulation, but the Gold Standard Act of 1900 required the Secretary of the Treasury to keep all kinds of money at a parity with gold, a provision which meant that any kind of money upon presentation at the Treasury should be redeemed in gold. Thus the gold standard was maintained, making every dollar the equivalent of a gold dollar. To the average man, money was simply money, whether it was gold, silver, or some form of paper currency. He was not likely to complain unless some one handed him a quantity of coin, when he might good-naturedly ask for paper. The gold standard may have been a "cross of gold" to Bryan, but to bankers, business men, and the investing public it became a "golden calf."

ITS ABANDONMENT. But times can change. With nearly all of the great nations driven off the gold standard by disturbed economic conditions following the First World War and with the business decline in this country going well below what we had previously considered the bottom

⁸¹ Legal Tender Cases, 12 Wallace 457 (1871).

⁸² *Juilliard v. Greenman*, 110 U.S. 421.

of the economic trough, many voices were raised for inflation. As prices continued to fall we abandoned the gold standard (April, 1933), not because the country's gold holdings were low (they were quite the reverse), but because it was hoped that by cutting loose from gold the value of the dollar would decline, thus raising the price of goods. The plan seemed to work.

In May, 1933, Congress, when considering farm relief, took other steps toward inflation. Further inflation does not seem to have been a part of the program of the Democratic leaders, but the "inflationary" element staged a successful revolt in Congress and it was only by a compromise very skillfully engineered by the President that several types of inflation were not made mandatory. What the bill did provide for was *permissive* inflation, leaving the President to exercise at his discretion several inflationary powers, among which was the power to reduce the gold content of the dollar by as much as 50 per cent. This act might have filled conservatives with consternation but for the President's assurance that the powers granted under it would be used only with "the definite objective of raising commodity prices to such an extent that those who have borrowed money will, on the average, be able to repay that money in the same kind of dollar which they borrowed." In other words, the promise was that money would not be cheapened more than might be necessary to place dollars and commodities in the relationship they held about 1926.

In January, 1934, the President reduced the gold content of the dollar by about 41 per cent. Prior to that time the President had ordered holders of gold and gold certificates to turn them over to the federal reserve banks and accept other money for them; and Congress had cancelled the "gold clause" in contracts, clauses which stipulated payment in gold coin of the weight and fineness of the gold dollar before 1933. Gold no longer circulates as money. All the monetary gold is owned by the Government and held by the Treasury (physically the gold is in large bars and is kept in a deep stronghold in Kentucky). This gold, worth about \$11,000,000,000 in terms of the devalued dollar, and representing approximately half of the world supply, serves as the metallic base for our paper currency. But silver also serves as a base for our money. By the terms of the Silver Purchase Act of 1934 the Secretary of the Treasury is required to purchase silver from time to time until one fourth of the monetary stock shall consist of that metal. With certain exceptions the government has assumed ownership of all silver, some of which it keeps in bullion and some of which it circulates in the form of silver dollars. The problem of 1933 of how to bring about a decline in the value of the dollar and thus raise prices was solved all too well by our entrance into the Second World War. The insatiable demands of the war machine have caused prices to rise and will cause them to rise much higher.

Early history of banking: 1. **THE BANKS OF THE UNITED STATES.** A good banking system is considered an essential for an industrial society; but it cannot be said that our own system has always kept pace with our needs.

In 1791 Congress chartered the First Bank of the United States and gave it the power to issue notes to serve as paper money. It was a great aid, not only to business but also to the government; for it was of material service in collecting the revenues, in advancing loans to the government, and in serving as its depository. Although Jefferson and others who stood for a strict construction of the Constitution maintained that Congress had no authority to establish such an institution, the courts were not called upon to settle the issue. The Bank's charter expired in 1811; but the financial situation was such after the War of 1812 that Congress chartered the Second Bank of the United States. This Bank had a somewhat stormy history. The constitutionality of its charter was attacked but upheld (*McCulloch v. Maryland*). The state banks resented the fact that it competed with them in what they and the local politicians considered their exclusive field of operation. Also, there was a general desire for higher prices, for inflation, which the central bank resisted. Then, too, frontier people generally feared and hated it as a sort of monster which drew to itself the wealth which they had earned by the sweat of their brows. Jackson made it a paramount question, and won a great victory on the issue in the presidential campaign of 1832. When its charter expired in 1836, the Bank came to an end as a national institution.

2. **THE STATE BANK MONOPOLY.** For nearly thirty years thereafter, banks operating under state laws had a monopoly of the business. Banking laws were very liberal, altogether too liberal in the majority of the states. The states were prohibited by the Constitution from issuing bills of credit, but it was held that they could authorize banks to issue such bills. A few states permitted banks to issue no more notes than they were able to redeem in gold, and a few banks in states with lax laws followed conservative policies and restricted the issue of notes. But the states and the banks commonly responded to the popular demand for cheap money. In circulation were notes as "good as gold," notes worth fifty cents on the dollar, and notes worth little or nothing, depending upon the bank of issue.

The national banking system. The Civil War brought the present national banking system into being. To the obvious need for a national currency system was added the urgent need of the government for a market for its bonds. The Act of 1863 and later amendments required each national bank to issue notes up to the amount of the capital stock of the bank, such notes to be secured by federal bonds owned by the bank and deposited with the United States Treasury. Shortly after the Banking Act was passed, Congress taxed the notes of the state banks out of existence,

thus leaving the national banks a monopoly on the privilege of issuing notes. Although the new system brought about marked improvement in banking and currency, defects were revealed in the course of time.

ITS PRINCIPAL DEFECTS. If a single word can characterize these defects, that word is *inelasticity*. The cash reserves of the banks were largely concentrated in New York. This concentration of reserves was not in itself bad; but since there was no agency controlling the banking reserves of the country, they could not be quickly shifted to meet the credit needs of other localities. Again, both local and central banks were subject to a rigid requirement to retain certain percentages of their deposits as reserves, which meant that when the reserves reached these points on the down grade there could be no extension of credit, a situation which is likely to bring disaster to business. Another defect was in the restriction that no notes should be issued except those covered by government bonds. Notes issued on the general assets of the banks would have provided a more elastic currency to meet the varying needs of business—more notes when business was active, and fewer when business was “off.” Various “depressions” and “panics,” particularly that of 1907, exposed these and other limitations of the system.

The Federal Reserve System. The Federal Reserve Act of 1913 (as amended in 1935) brought about fundamental changes in the banking system. The country was divided into twelve districts and a federal reserve bank was established in each. The stock of these banks is owned by the local “member banks.” All national banks must be members, and state banks may become members by complying with certain requirements. An individual has very few business transactions with a federal reserve bank. They are the “bankers’ banks,” although the individual, banking with a member bank, benefits indirectly.

FUNCTIONS OF THE FEDERAL RESERVE BANKS. Just what are the functions of the federal reserve banks? In the first place, they hold practically all of the reserves of the member banks. While banking reserves are thus more highly centralized than before, the discretion allowed federal reserve officers is such that these reserves can be made available for credit needs in various parts of the country much more freely than under the old system.

The reserve banks perform a second important function by purchasing from member banks the promissory notes or commercial paper of persons to whom the member banks have loaned money. This is called “re-discounting.” With the receipts from this “commercial paper” the member banks can make loans to other individuals and thus continue to serve the needs of local business.

A third important service performed by the reserve banks is in the issue of notes. The notes now in circulation are for the most part *federal reserve notes*. They must have a backing of at least 40 per cent in gold certificates, the remaining 60 per cent or less being covered by eligible

commercial paper (notes) which the reserve banks have obtained by re-discounting or otherwise. Member banks may secure this currency for their customers by taking commercial paper to the reserve banks and bringing back borrowings in the form of federal reserve notes. Among other important functions performed by the federal reserve banks may be mentioned their service as the national government's bankers. Through these banks the government receives and makes payments, sells its bonds, and makes other business transactions. This use of the federal reserve banks made possible the closing of the nine sub-treasuries the government had formerly maintained in important centers.

Still another service is performed by the System through its "open-market" committee. This committee consists of the members of the Board of Governors of the Federal Reserve System and five representatives chosen by the reserve banks. It is the duty of this committee to exercise control over the buying and selling of the notes and bonds of the United States by the reserve banks. These banks by dealing in the obligations of the government very largely determine the supply of bank credit available for commercial purposes at a given time. If more money is needed for business purposes, the open-market committee may permit the reserve banks to purchase government obligations to the amount of a billion or two, thus putting money into business channels. This procedure also helps keep up the price of government bonds. If the committee wishes to check credit expansion, it may authorize the sale of government obligations by the reserve banks, thus taking money out of ordinary investment channels.

THE BOARD OF GOVERNORS. One of the defects of the banking system before the Federal Reserve Act was the absence of central control. This is now secured through the Board of Governors which is composed of seven members appointed by the President and Senate for terms of fourteen years. The President also designates the members of the Board who are to serve as chairman and vice-chairman. Each reserve bank has its own board of directors who name a president and vice-president subject to the approval of the Board of Governors in Washington. The president of a reserve bank is its responsible executive officer.

This centralized system made possible the expansion of credit necessitated by the First World War. No irredeemable paper was issued, as during the Civil War. Despite the inflation in 1917-20, the country managed to stay on the gold standard, an achievement for which the reserve system was largely responsible. After the First World War, federal reserve authorities, through the rediscount rate and open-market operations, managed to control credit conditions and thus keep business on a fairly even keel; but after 1928 their efforts were not so successful. It should be observed, however, that the business disasters of recent years were caused by a number of factors, the greater number of them entirely out-

side the sphere of activity of the Federal Reserve System. Broadly speaking, the Federal Reserve System has been a success. This is not to say, however, that the whole banking system has been a success.

The banking crisis of 1932-1933. The collapse of our banking system in February and March, 1933, is fresh in our memories. One of its principal causes was speculation. Instead of making their loans exclusively for self-liquidating commercial transactions as commercial banks do in England and Canada, our banks eagerly entered the field of investment loans, buying bonds and then more bonds of many varieties in the golden age of 1921-1929. High authorities in Washington encouraged commercial banks to embark upon this enterprise. With the business decline, bond values declined; and as business continued "down the chute," bonds went along with it. When large withdrawals of deposits were made, banks had to sell their bonds regardless of the demoralized market. Banks failed by the hundred, 522 in the month of October, 1931. The National Credit Corporation was formed, an organization through which strong banks would help weak banks. Success was only temporary. In January, 1932, the Reconstruction Finance Corporation was created to make liberal advances to hard pressed banks. This was a success for a few months. But it was becoming obvious by this time that farm mortgages would have to be written down and that the real estate situation in the cities was also threatening the banks. There came another spurt of bank failures, and in February and early March of 1933, governors of a number of states closed banks. There was another Black Friday (March 3) in New York, \$100,000,000 in gold being withdrawn from the banks in the nation's financial capital in a single day. At 4:30 A. M. the next day, Governor Lehman closed all the banks in the state, having the solemn declaration of the bankers that they could not remain open another half day. On March 6, President Roosevelt closed all the banks in the country. With the utter collapse of the banking system in a country which had well over four billions in gold, the nation had witnessed the "greatest débâcle in banking history."

The banking acts of 1933 and 1935. But the country breathed more easily. The worst had happened at last. Called into special session, Congress immediately approved the President's proclamation closing the banks and placing an embargo on gold exportation and authorized him to take similar action in future emergencies. Congress further empowered the President and the Secretary of the Treasury to regulate banking during such emergencies; authorized the Secretary of the Treasury to prohibit the hoarding of gold or gold certificates; gave the Comptroller of the Currency power to appoint "conservators" for national banks whose assets were in danger; and provided for the emergency issue of currency against the security of obligations of the United States or notes, drafts, bills of exchange, or bankers' acceptances. With the passage of this act, solvent

banks were reopened by national and state authorities and the country took on a genuine spirit of optimism.

A few months after these emergency acts, a comprehensive banking law was passed. The act was designed to correct the weaknesses of the banking system in a number of particulars, but its most important sections are those designed to prevent speculative use of bank funds and to guarantee deposits. A curb on the speculative use of funds is sought through the significant requirement that banks which are members of the federal reserve system must divorce their security affiliates. Private banks which receive deposits must do likewise, and if such banks elect to continue to receive deposits they must submit to state or federal examinations. Among other provisions aimed at the same purpose are those which require the federal reserve banks to keep advised on the loans and investments of member banks, prohibit member banks from accepting funds which are to be loaned to brokers, forbid interlocking directorates with security firms, and make officers of a member bank ineligible for loans by that bank.

The act provided for a deposit guarantee (strongly opposed by many banking authorities) varying from 100 to 50 per cent, depending upon the amount of the deposit. The Banking Act of 1935 simply calls for full insurance on amounts up to \$5,000, but that is the maximum which may be insured. The insurance fund is raised by annual levies of one twelfth of one per cent on the average deposits of the insured banks, and it is administered by the Federal Deposit Insurance Corporation. All banks in the Federal Reserve System must accept the guaranty plan. Other banks may have their deposits insured also, but any state bank which has deposits of more than a million dollars must become a member of the Federal Reserve System in order to retain the insurance feature. Thus, through the Federal Reserve System and the Federal Deposit Insurance Corporation the national government is reaching into the far corners of the country and greatly strengthening a banking system which has long needed more unity and control. Yet we are still some distance away from absolute central control of banking.

Government banking institutions. No discussion of banks would be at all adequate which fails to make mention of the credit agencies the Government has established since 1930. These agencies do not have all of the attributes of ordinary banks, but they perform many of the functions of banks, supplementing and perhaps competing with them, and they may in time crowd them considerably. There are the Farm Credit Administration, the Federal Loan Home Banks, the Federal Savings and Loan Association, and perhaps a score of others.

The first, the best known, and the giant of all of these is the Reconstruction Finance Corporation. It was established in 1932 and authorized to advance money to banks, trust companies, building and loan associations, railroads, and certain other institutions. Presently it was authorized to

make loans to general business, and it entered the field in a large way but not without caution. In its first years it made some loans for relief, loans which no one expected it to recover, but by far the largest share of its loans have been to business enterprises on a business basis. Billions were loaned in a few years, billions which were of inestimable benefit to commerce and industry and on which the government took no loss. In 1937 it was thought that it had served its purpose and might withdraw from the field, and Congress actually took steps to terminate its activities. But then came the "recession" of 1938, and on its heels the Second World War and our rearmament program. Now R.F.C. is deeply involved in furthering the war program. Under the authority of five or six acts of Congress and various executive orders, it is engaged in such war activities as making loans to, and purchasing the obligations of, any business enterprise for any purpose advantageous to the national defense; purchasing, for the same purpose, the capital stock of any business corporation; the creation and organization of corporations, such as the Defense Plant Corporation and the Rubber Reserve Company, to aid the government in its defense program; the purchase of various strategic materials; the erection and expansion of plants for the production of arms and other instruments of war; the provision of facilities for aviation training; and a host of other undertakings. There is no sign now that the functions of this corporation will be dispensed with for some years. After the war there will be a stupendous task of reconstruction, both at home and abroad, and it is not likely that a better agency, private or public, will be established to deal with the financial problems which reconstruction will bring.³³

The state banks. There are still about 10,000 state banks, which is nearly double the number of national banks. Unless state banks are members of the Federal Reserve System, or have accepted the deposit insurance plan (the greater number of them have), they are not subject to any federal control. The states supervise their banks through a department of banking, or a combined department of banking and insurance. Such department or commission, by requiring reports and making inspections, enforces the state law respecting accounts, bank investments, ordinary loans, and so on. State laws regulate with varying degrees of effectiveness the organization and capitalization of banks, and, as an additional protection to depositors, they commonly provide that stockholders may be assessed in a limited manner, ordinarily to an amount equal to the par value of the stock owned, to make good the losses of depositors. The chief criticism of state banks is that they have failed in alarming numbers. They are frequently poorly administered, often too depend-

³³ *Reconstruction Finance Corporation Act, as Amended, and Other Laws Pertaining to R.F.C.* (pamphlet, 1941); "The War Goes to Mr. Jesse Jones," *Fortune*, Dec., 1941, p. 91. Even at the date of this article the R.F.C. budget was about that of the budget of the entire Government in 1929.

ent upon a single industry, and usually too small. "What will the little banks do in the little county seats?" inquired the late Senator Huey Long of the Senate banking authority, Carter Glass. "'Little banks!'" answered Senator Glass scornfully. "Little corner grocery men who get together \$10,000 or \$15,000 and then invite the deposits of their community and then at the very first gust of disaster topple over and ruin their depositors! What we need in this country are real banks and real bankers." Many another person agrees with Senator Glass that the day of the small bank has passed and harbors the minimum hope that those which cannot enter the Federal Reserve System will close their doors. What the country needs is a unified banking system, a system which the recent national legislation tends to establish.

Protection of investors. Although not in the class of banking legislation, certain acts of recent years may receive appropriate mention at this point because they are designed primarily to protect investors. The Securities Act of 1933 requires that all new issues of securities, with a few exceptions, be submitted to the Securities and Exchange Commission before being offered for sale in interstate commerce or through the mails. The promoters must give to the Commission all essential information regarding the securities, the promoters being held responsible for the truthfulness of this information. The Securities Exchange Act of 1934 attempts to regulate stock exchanges through this same Commission. The act requires such procedures as the submission of exchange by-laws to the Commission for approval, registration with the Commission of securities listed on the exchanges, and presentation to the Commission of the financial conditions of firms and corporations whose securities are to be so listed. The Public Utility Holding Company Act of 1935 imposes upon the Securities and Exchange Commission the duty of supervising various activities of holding companies and subsidiaries, such as security transactions, intercompany loans, proxies, and dividends. The act is designed, of course, to protect consumers and investors. The Trust Indenture Act of 1939 requires that bonds, notes, debentures, and similar securities offered for sale be issued under standards satisfactory to the S.E.C. The Investment Company Act and the Investment Advisers Act of 1940 afford further protection to investors and confer additional duties upon the Commission. The former act provides for the regulation of investment trusts and investment companies, and the latter for the registration of all persons engaged in the investment advisory business and prohibits certain abuses which had existed in this business. Although the Commission has the power to control in some degree the issuance of securities by public utility holding companies, no statute which it administers guarantees an investor against loss. What the Commission does is to require complete disclosure of information about se-

curities. The investor is left to form his own opinion and to assume the risks incident to investment.

V. STATE FINANCE ³⁴

We come now to the subject of state finance, always a problem, but one of increasing concern and complexity in our generation which witnesses governmental functions increasing rapidly and the sources of revenue failing to keep abreast of the need for funds. We shall consider this subject from the major angles of revenue and expenditure.

Limitations upon the taxing power. Proceeding now to the various phases of state finance, we begin with a brief discussion of the limitations upon the legislature's power to tax. In the *first* place, there is the limitation with respect to the taxing of commerce. The Federal Constitution prohibits the states from levying import, export, or tonnage duties. Control of interstate commerce by the national government means that the states cannot tax interstate commerce. The states may, however, tax property as such, even though it is used in interstate or foreign commerce. Thus, the states may and do impose general property taxes upon railroad and steamship companies. What is prohibited is the taxing of an *act* of interstate or foreign commerce. *Second*, everyone knows by now that the state may not tax the national government or its instrumentalities.³⁵ *Third*, state taxation must satisfy the demands of the "due process" and "equal protection" provisions of the Fourteenth Amendment. The limitations imposed upon the states by this Amendment are essentially the same as those imposed upon the national government by the Fifth Amendment. They are discussed under "Limitation Upon the Power of Congress to Tax" in the first section of this chapter. State constitutions also limit the taxing power. They almost invariably contain the "due process" and "equal protection" limitations, thus duplicating the Fourteenth Amendment in those particulars. *Fourth*, state constitutions usually contain the provision that taxation shall be equal and uniform. Equality is usually interpreted to mean that taxes shall be in proportion to the value of taxable property; uniformity, to mean that all articles or kinds of property in the same class shall be taxed alike.

Sources of revenue. States draw their income from various sources. Probably no two states have identical tax systems; but nearly all of them

³⁴ A. E. Buck, *The Budget in Governments Today* (1935); W. B. Graves, *American State Government* (1941 ed.), Chs. XIII-XIV; C. L. King, *Public Finance* (1935), Chs. VI-XXI, XXIX-XXXI; L. D. White, *An Introduction to the Study of Public Administration* (1939 ed.), Chs. XIII-XVII.

³⁵ On limitations *one* and *two*, see Ch. 3, sec. I.

levy a general property tax, an inheritance tax, a corporation tax, and various license taxes, and a number of states now levy income taxes.

1. THE GENERAL PROPERTY TAX. The general property tax is the oldest state tax, and the one from which practically all the revenue was formerly derived, but from which only about six per cent of it is derived at present. It still carries by far the largest share of the revenue burden in most cities and counties. The theory of the general property tax is simple. Each person pays a tax determined by the value of his house, lands, horses, cattle, machinery, furniture, jewelry, stocks, bonds, mortgages, and so on. This is an *ad valorem* tax—so much per hundred dollars of assessed valuation. It falls alike upon all property owners, supposedly. It was fairly satisfactory in the days when governments did not need much money, and when the earthly goods of most men consisted of real property and tangible personal property. The farmer could not hide his buildings, fields, and live stock from the assessor; nor could he conceal easily the great hall clock or the “parlor” sofa. Furthermore, the ordinary assessor had little difficulty in arriving at a fair valuation of these properties. But the concentration of property in cities and the revolutionary increase in the amount of intangible property (securities of various kinds) since the Civil War have changed all this. City property is ordinarily much more difficult to evaluate than rural property; and intangible property locked in the owner’s strong box, whether held by rural or urban inhabitants, often escapes the assessor’s rolls. Indeed, the kindly assessor may rather encourage a timid individual to make no mention of his intangibles, since the general property tax rate in some states is almost confiscatory when applied to them.

Assessment. The problem of assessing real and personal property for purposes of taxation calls for more than passing mention; for unscientific assessment constitutes a fundamental shortcoming in the administration of the general property tax. The assessors are local officers, usually elected, and seldom have any training for their important work. In most states, the assessors are given written instructions, and in a few, some additional aids; but no amount of such help will reduce assessment to routine or give impartial valuations to property unless the assessors are honest and intelligent. The taxpayer often makes his own assessment, particularly his personal property assessment.

The assessor walks into the home of a wealthy individual and makes dutiful inquiry about pianos, washing machines, electric refrigerators, and clocks; but he hardly notices the fine paintings on the wall or the oriental rug on the floor (unless he becomes conscious of not having properly cleaned his shoes before entering). Yet the rugs and the paintings are probably worth much more than the other articles enumerated. If the assessor places them on his list, he gives them the very low value which the owner mentions. The assessor moves on, feeling perhaps that

justice has not been done, but not knowing just what he can do about it. He goes next to a home presided over by a proud but unsophisticated bride. Hardly realizing that she is talking to an assessor, she lists their modest properties at something approximating their full value. A more cheering version of this story has the husband, who is on friendly terms with the assessor, meet that gentleman as he is leaving the house and set him right as to the "real" value of the property. At any rate, these fictitious cases illustrate the very common fact that assessments of personal property are made largely by the owners rather than by the assessor.

Equalization. Manifestly, assessments will vary greatly even among individuals visited by the same assessor, and they vary still more among the districts canvassed by different assessors. In order to reduce these inequalities, county or other district boards of review or equalization are authorized to hear complaints of individual taxpayers and to correct material injustices in assessments. These boards are also required to equalize assessments among the several districts or townships of a county, to the end that all may be equitably taxed. Ordinarily, however, only the grosser inequalities are corrected. When county authorities have passed upon assessments, the rolls are placed before a state tax commission or other state officers serving as a board of equalization. This board may order reassessments in particular counties or districts, or reassessments of particular kinds of property. It is also the duty of this board, or of some other state authority, to assess public utilities, such as railroad, telegraph, and telephone systems—properties which, because of their nature and extent, are not easily or equitably assessed by local authorities. A number of states have wisely entrusted the central tax commission with the power to supervise local assessments and to make investigations of the general conditions of taxation. Such commissions have greatly improved the taxation systems in several states.

Criticisms of the general property tax. It has already been shown that it is very difficult to get fair assessment of property. Ordinarily, real property and the general run of tangible personal property are not assessed in an equitable manner and there are still wider disproportions in the assessment of other properties. The luxuries of the wealthy are usually assessed too low and intangibles are frequently not assessed at all. Taxes based upon unfair assessments are, of course, unfair. The burden falls with particular force upon the owners of real estate and tangible property, hitting the farmer as a class harder than any other. But suppose all property is assessed alike—the tax is still subject to criticism, for the reason that some forms of property yield much greater income than others. A number of states have frankly recognized this, and they have provided for the classification of property for purposes of taxation. For example, intangibles have been placed in a special class and taxed at a

lower rate than tangibles. What drove the intangibles into hiding originally was that the general property tax on their actual value was practically confiscatory. With the lower tax rate, there is less urge to conceal them and less leniency for those who do conceal them. The result is that intangibles are now more commonly declared, the state gets more return for the lower rate than it did for the higher, and the owner of real estate and tangible personal property has some aid in supporting the government. But classification of property, although affording some relief, does not solve the tax problem. Recognizing the unsatisfactory results of this general property tax, several states have abandoned it, leaving it for local government units. In desperation farmers and taxpayers' associations have compelled some states to place a limit on the rate of the general property tax. All of the states have sought other sources of revenue.

2. **INCOME AND INHERITANCE TAXES.** One of these newer forms of taxation is the income tax. Several states had tried it before the Sixteenth Amendment made it possible for the national government to levy taxes on incomes from whatever source derived. About thirty of the states, a number of them encouraged by the example of the national government, now levy income taxes. The state systems, like the national, are progressive—with the smallest incomes exempt, low rates for modest incomes, and higher rates for the bigger incomes. The highest rate is low (usually about 6 per cent) as compared with the national tax rate. Naturally enough, the income tax does not meet with universal acclaim. For instance, it is not popular with those who would pay little or no taxes under the general property tax requirement. Nevertheless, it is commonly considered fair, being based on the ability to pay.

The inheritance tax is employed in nearly every state. The rate of this excise on the privilege of a beneficiary to inherit property varies with the amount of the inheritance and with the beneficiary's degree of relationship to the deceased. The inheritance tax has a great deal to commend it. Often, but not always, an heir has done little to build up the fortune he inherits and thus has no very strong ground of complaint when the state takes a share of it. So strong an individualist as President Hoover said that income and inheritance taxes help to bring about a more desirable distribution of wealth.³⁶ It should be noted that income and inheritance taxes are not the state "gold mines" some people imagine them to be. Although in a few states they may yield one fifth or one sixth of the state revenue, taking the country as a whole, they yield only about one eighth of it.

3. **BUSINESS TAXES.** Some special form of tax is commonly levied upon many types of businesses. These taxes take various and often complicated forms. One of the simpler forms is the corporation income tax

³⁶ C. A. Beard, *American Government and Politics* (1931 ed.), p. 231.

which is levied in about two thirds of the states. Corporations are often subject to a franchise tax (a tax on the privilege of doing business in the state), which tax is usually a small percentage of the value of the capital stock of the corporation, or a percentage of dividends paid, or some other fair basis of measurement. Incorporation fees represent another form of tax. Of course states may tax foreign corporations (those chartered in other states) as well as domestic corporations, provided they are taxed in proportion to the amount of business they transact in particular states. Even corporations engaged in interstate commerce—railroads and telegraph companies, for example—may be taxed by a state. In taxing such business, the state must be careful, however, that the tax bears a fair proportion to the value of the business carried on in the state. For example, a tax of 2 per cent on every Pullman ticket sold in a state would be invalid, because it would have practically no relation to the value of the Pullman business in that state; but a tax on Pullman tickets based on the number of miles such passengers travel within the state would be valid, because it would obviously bear a fair relationship to the value of the business in that state.³⁷

In addition to the corporation tax, many states levy taxes upon business conducted by individuals. Taxes upon professions and occupations are particularly popular as sources of revenue in the South. Several states have put chain stores in a special class and have levied much higher taxes upon them than upon the "home-owned" stores. The purpose of this tax law is undoubtedly to aid the local stores as well as to bring in revenue.

4. THE SALES TAX. There are various forms of this tax but the principal one is the retail sales tax. It was not in general use until 1933, when the depression brought it in as an emergency source of revenue. Although depression-born, it showed few signs of departing with a partial restoration of normal times. It has been found to be a very productive source of revenue. Furthermore, it is very popular with tax-payers' associations whose chief concern is to keep down taxes on real property. One often hears the statement that the sales tax broadens the base of taxation. Of course it does, but this means that many very poor people are brought within the ranks of taxpayers. There is little doubt that this tax bears much more heavily upon the poor than it does upon others, for the poor have to spend a very substantial part of their income for the bare necessities of life.

5. EXCISE TAXES. Taxes on liquor and tobacco yield considerable revenue for the states, perhaps a fifth of the total. A gasoline tax, varying in rate but commonly 3, 4, or 5 cents per gallon, is imposed in practically every state. Originally funds derived from this source were very properly and appropriately set aside for highway construction and main-

³⁷ Pullman Co. v. Richardson, 261 U.S. 330 (1923).

tenance, but in periods of financial stringency, periods in which the gas tax still produced a handsome revenue, legislatures diverted some of these funds to other uses, a procedure which with considerable justification was roundly denounced by automobile associations.

Other sources of revenue. The foregoing list includes the principal sources from which the states derive revenue by taxation. Certain other revenues are derived from fees for particular services. The various court fees connected with legal processes furnish a familiar example. Various license fees are collected for the enjoyment of specific privileges, such as, hunting, fishing, owning a dog, running a pool hall, selling beer, and the like. The license is required primarily because it furnishes the state with a convenient means of regulating the thing licensed. The fee charged may or may not be based on the cost of regulating the privilege or business. Some states still receive revenues from the lands granted by the national government for public education. A few states have some returns from their own business enterprises, such as, docks, canals, warehouses and more recently, the liquor business. Of course the taxpayers are ultimately responsible for these ventures, which sometimes turn out to be liabilities rather than assets. Fines supply a little revenue in every state, but the amount is probably much smaller than the average citizen realizes. In enumerating the sources of revenue we should by no means forget the various federal aid funds and the outright grants the national government makes to the states in depression periods.

Where the money goes. From these sources of revenue the states now receive approximately four billions annually. Naturally, their expenses ought to be about the same, although they may be slightly less than the revenue in times of prosperity and in excess of the revenue in "lean" years. Schools, highways, and various forms of social security absorb the lion's share of state income. Something must be set aside each year for payment of interest and principal on debts. Health, sanitation, conservation, libraries, correctional institutions, and similar services each get small shares. It has already been noted that the cost of state government has increased greatly in the past thirty-five years. This increase, with two exceptions, has been fairly evenly distributed over the various services. The exceptions are the highway and public welfare departments, expenditures in the former having advanced about twice as rapidly as in the other services and in the latter (only since 1932) many times more rapidly.

Early haphazard appropriation methods. In former times, the state legislatures passed their revenue and appropriation bills with the same general absence of system that characterized congressional conduct in such matters before the national budget system was inaugurated. Each spending service, acting with little or no regard for the other services or for any superior administrative officer, would submit a statement of

its needs, usually very much exaggerated, to the committee on appropriations. The most influential or most insistent administrators might get as much or more than they needed from the committee; others would probably get less. The "pork barrel" and "logrolling" evils flourished in state legislatures as in Congress, resulting in additional extravagance and waste. Occasionally, a legislature would make a gesture of economy, either by reducing appropriations all around, without considering the needs of particular services, or, perhaps more likely, by reducing the appropriations for those services the curtailment of which would bring the least adverse political reaction. Frequently, the committee (or committees) on appropriations paid little attention to the state revenues with which the appropriations should balance. Almost invariably a number of appropriation measures, some of them smelling strongly of pork, would pass the legislature in the last hectic days of its session. The bills then went to the governor, who, in most states, could veto and reduce separate items. The typical governor was a little more frugal than the legislature, and he usually wielded the pruning knife somewhat vigorously, although not always wisely. In any case, the governor's veto could operate only as a negative correction upon the "program" of expenditure proposed by the legislature.

Budget systems. With the rising cost of government, taxpayers very naturally became insistent that something be done to stem the tide. Students of public administration, particularly Dr. F. A. Cleveland, pointed out very clearly that order could be brought into state finances and some economies could be effected by the adoption of a budget system. Beginning before the First World War period, the idea spread rapidly among the lawmakers, and within twenty years every state had a budget system of one sort or another. A few states have not carried the idea very far, entrusting the preparation of the budget to a legislative committee. This legislative budget system may secure unified action with respect to revenue and appropriations in the legislature; but it fails to give the high executive officers who must administer the expenditures a sufficient voice in proposing them. Nearly a third of the states have the budget prepared by a commission, which commonly consists of the governor, several other administrative officers, and a few members of the legislature. The administrative budget plan is designed to bring about greater harmony between administrative officers and members of the legislature. Legislators, having helped prepare a budget, will feel under some obligation to defend it in the legislature. The plan which meets with the most general favor and which is employed in about two thirds of the states is the executive budget system. It varies, of course, among the states; but broadly speaking, it follows the budget practice of the national government. The governor, like the President, is individually responsible for preparation of the financial program. One-man responsibility seems to

work better than group responsibility. Of course, the concentration of the budget authority in the hands of the chief executive greatly increases his power; but despite occasional abuses this is generally held to be desirable. Reforms in American government have very commonly proceeded along the line of increasing executive power.

The legislature and the budget. Regardless of how the budget is prepared, the legislature has the authority to do with it as it sees fit. It may accept it as it stands, reduce it as a whole, increase it as a whole, strike out items, or add new items. But with a program of expenditures presented along with the estimates of revenue, the legislature is not in position to "run wild" in enacting fiscal measures. The budget gives the people something definite to insist upon, and if the legislature changes the budget materially, it must justify itself for doing so. It has turned out, therefore, that in spite of the legal authority of the legislature to play havoc with the budget, there is much less extravagance in voting appropriations now than formerly. Pork barrels have become smaller and logrolling has become a more hazardous legislative occupation. Particularly is this true where organized bodies of taxpayers are vigilant when the legislature is in session. In Maryland the legislature has less freedom with the budget than in other states. There, as in other states, the legislature may strike out or decrease (with a few exceptions) items in the governor's budget; but it is prohibited by the state constitution from making any increases except for legislative and judicial expenses. This rule rather effectively limits the distribution of pork, and some authorities recommend its general adoption.

Supervision of expenditures. The state's financial house cannot be set in order simply by the adoption of a system for making appropriations. The expending of the money should be supervised at all times. Formerly, legislatures attempted to control the expenditures of the various administrative services by listing in a separate item of appropriation the amount which might be used for each purpose of a service. This system was too rigid. It did not secure the greatest wisdom in the use of funds, because the legislature could not look a year or more ahead and determine exactly what expenditures should be made. It is well enough for the legislature to decide what projects shall be undertaken and how much shall be allowed for these projects; but the detailed control of expenditures within a service can be exercised much more satisfactorily by the higher executive officers.

A number of states have adopted the plan of making appropriations for each department and commission under several main headings, such as salaries, supplies, and capital outlays, leaving the chief administrative officers some discretion as to the details of expenditure under each heading. In these states, it is ordinarily provided that funds may be transferred from one heading to another when an emergency exists and when

the permission of the governor has been obtained. Some states go still further and require the spending officers to secure the approval of the governor for their monthly or quarterly expense program. Such systems as these give a very desirable flexibility in the matter of expenditures. But this sort of supervision in itself is not sufficient. An up-to-date system of accounting, which most of the states are slow to adopt, is necessary. It would show exactly where all the state's money has gone, reveal bad contracts and excessive costs, and thus lead in some measure to the stoppage of waste.

The methods of control here outlined are executive devices. They are the means by which the chief administrator may enforce economies and develop efficiency. By what means may the legislature satisfy itself that the appropriations it makes are legally expended? This is the function of the auditor. He is the servant of the legislature as the director of the budget or the director of finance is the agent of the chief executive. Rather commonly the auditor may pass upon the legality of a proposed expenditure and disallow it, if in his opinion it is contrary to law. Authorities take sides and give each other some stout blows on this question, some holding that the true function of an auditor is not to disallow proposed expenditures but to call to the attention of administrative officials any irregularities in their proposed expenditures and, if the warning is unheeded, report the situation to the legislature. This is the executive view of the matter. Those who view it from the legislative standpoint are convinced that nothing less than the power to disallow can make the auditor an effective agent of the legislature.³⁸

Borrowing money. Any government must occasionally borrow money. A number of the early states displayed considerable prodigality on this score, and, as a result, nearly all the states have placed limits upon the amounts the legislatures may borrow. The Federal Constitution imposes only one limitation—that the states may not borrow through the expedient of issuing bills of credit (paper money). State constitutions contain such types of limitations as: a fixed sum; a sum which may not be exceeded except for certain specified purposes; a sum which may be exceeded only with the approval of the voters; and specifications with respect to the purposes for which money may be borrowed. A few states have practically no debt; some have considerable indebtedness but in no state is the per capita debt more than a small fraction of that of the national government. The total of state obligations is about three and one-half billions—somewhat smaller than the state revenues for one year.

Debts have been incurred in times past for various internal improvements, chiefly for waterways. During the last twenty-five years, soldiers'

³⁸ See L. D. White, *Introduction to Public Administration* (1939 ed.), Ch. XVII, especially pp. 269 ff. See also J. W. Martin and Robt. Sawyer, "The Independent State Post-Audit," *State Government*, May, 1941, p. 107.

bonuses and highways have been the principal purposes for which debts have been contracted. States borrow by issuing interest bearing bonds, which are bought by investors. The period for which bonds are issued ordinarily varies with the duration of the benefit to be secured by the proposed expenditures—ten, twenty, or more years. An entire issue of bonds may be retired on a specified date of maturity. The state sets aside, or is supposed to set aside, a fund each year so that the entire principal will be on hand when the bonds mature. This is called the “sinking fund system.” It is all right in theory, but in practice the states sometimes fail to build up the fund or lose a part of it by bad investments. When the bonds mature it thus becomes necessary to borrow again. A system which works better in practice and which many cities and some states now employ is the “serial bond system.” By this system some bonds are made to mature each year and they are retired from current revenue.

VI. LOCAL FINANCE ³⁹

Importance of local finance. When we come to the counties and cities, we find about the same story of increased cost during the last thirty-five years that we found in the states. But allowance should always be made for the expansion of functions which has accompanied this increase in cost. Then it must be remembered also that the value of the dollar declined greatly during the First World War. Although there has been some waste and extravagance, it is as unfair to characterize local authorities as a group of conscienceless spendthrifts as it is to put Congress and the state legislatures in that class. Nevertheless, the rising cost of local government has caused grave concern, particularly in the lean years following 1929. Counties spent about \$900,000,000 in 1913. That figure was practically doubled by 1930, but reduced somewhat in succeeding years. With the rapid growth of cities and the greater tendency to increase municipal functions, their expenditures have increased more rapidly than those of the counties. City expenditures now run to about three billion a year, thus falling not far short of the amount spent by the states. The budgets of New York City and Chicago are considerably larger than the budgets of the states in which they are located. Another interesting thing about city finance is that the larger the city the greater the per capita cost of government. What of the debts of local governments? These, too, have increased rapidly, the debts of the cities more rapidly than those of the counties. From 1922 to 1932 city and other local government debts were nearly doubled and reached a total of al-

³⁹ J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930), Chs. XVIII–XIX; L. W. Lancaster, *Government in Rural America* (1937), Chs. VI, VII; A. F. Macdonald, *American City Government and Administration* (1941 ed.), Chs. XXVI–XXVIII; W. B. Munro, *Municipal Administration* (1934), Chs. X–XV.

most seventeen billions. Since the latter date what had been regarded as practically impossible has happened—there has been no substantial increase in local debts. Around 1940 they were actually being decreased.

State control. The financial powers of local governments are limited by the state. Only such taxes may be imposed as are authorized by the state government. Ordinarily, the state specifies a certain maximum rate beyond which local authorities may not tax general property, and prescribes the exact rates of other taxes and licenses. In the matter of borrowing, the counties and cities are also limited by the state, the maximum amount usually being fixed at a certain percentage—five, eight, or some such figure—of the assessed valuation of taxable property. It is often provided, however, that the amount of indebtedness may be increased with the approval of the voters. These limitations are not always effective; for a number of special governing bodies, each with the power to tax and borrow money, may have authority over a part or all of the county or city area. Indeed, it is often for the purpose of circumventing financial limitations that these special authorities are created. Neither these nor any other attempts to establish rigid control over local finance are altogether satisfactory. Flexibility is the thing needed. This can better be secured by general limitations imposed by law and applied by state administrative authorities according to the demands of particular cases. A few states are making some progress in this direction.

Sources of local revenues. Counties derive their revenues chiefly from the general property tax, around 90 per cent of the tax revenue coming from this source. As indicated in the discussion of state taxes, local officers assess general property for purposes of state taxation. This same assessment serves local taxing bodies as a basis of taxation. Tax officials simply add the rates imposed by the various local taxing authorities to the rate of the state tax, and the property owner receives a bill for the total. Counties draw some revenue from licenses, fees, and fines. In some states the poll tax is a small source of county revenue. It is not uncommon for a state to apportion to counties a part of the state receipts from motor vehicle licenses, the gas tax, or from some other tax. Many states make direct grants to counties for specific purposes, particularly for schools and highways.

Cities rely somewhat less upon the general property tax than do the counties. A number of cities are authorized to tax occupations and professions, such taxes being based, for example, upon the volume of a business or upon average individual earnings in a particular profession. Street railways and other public utility companies must pay something into the city's treasury for the use of the streets. Often this tax is in the form of a small percentage of the companies' gross receipts. Some utilities are usually operated by the city itself. Water is very commonly sup-

plied in this way. Municipal revenue from such services, over and above the cost of maintaining them, is seldom very large. There is usually some controversy as to whether the city is making or losing money on its public utilities, the conclusion depending upon one's attitude toward the "government in business" and upon the method of accounting. Other sources of municipal funds include grants from the state and national governments.

SPECIAL ASSESSMENTS. Cities often make special assessments for particular improvements. For example, a street is to be paved, a sewer is to be laid, or a new park is to be opened up. Property owners near by will receive the greatest benefit, and they are accordingly required to pay a substantial part of the cost of the improvement. In the case of street paving, they are sometimes obliged to pay the entire cost. Obviously, special assessments will operate unfairly if the assessment does not bear a direct proportion to the benefit received, a proportion exceedingly difficult to calculate.

Appropriation methods. County budget systems worthy of the name are employed in only about a third of the states. In a few states the budget is prepared by an administrative officer of the county, usually the auditor. In others, it is prepared by the county board. In any case, the appropriation must be voted by the board. The absence of a financial program in the majority of counties no doubt leads to a great deal of waste. This waste is likely to pass unnoticed (in times of prosperity), for the reason that the expenditures of the average county are not large. But there are many counties, and, when the total cost is figured, we find that it is about half as much as the cost of state government. Effective county budget systems, with some state supervision and control, would probably reduce expenditures without impairing county services. Cities spend a great deal more money than counties, and, since they are also watched a little more closely by taxpayers, it is not surprising that most of them have adopted some sort of budget system. In fact, the cities deserve the credit for having introduced the budget system. The states adopted it later, and the national government finally followed suit.⁴⁰ In some cities the term "budget" is used in an attempt to conceal the fact that appropriations are prepared and voted in the same old careless and extravagant way. Other cities have budget systems to the extent that there is a budget-making authority standing between the departments which make the requests for funds and the councils which appropriate them; but only a few cities have taken another step, generally considered desirable, and have vested final budget-framing authority with the chief executive—mayor or manager.

Other taxing areas. Perhaps it seems enough when one has been taxed

⁴⁰ W. F. Willoughby, *Movement for Budgetary Reform in the States* (1918), pp. 5-8.

by the nation, the state, the county, and the city; but few taxpaying individuals escape so easily. Authority to tax, make expenditures, and borrow money is vested in officials of various other units of government. The towns of New England, the towns or townships of the West, and villages (commonly called "towns" in the South) everywhere have financial powers. Special districts have become common in recent years, particularly in the West and South. As stated in the chapter on "Administration," there are special districts for schools, highways, drainage, irrigation, sanitation, diking, mosquito abatement, and other purposes, each with the authority to tax. Often these districts are coterminous or overlapping, creating no little confusion and irritation with respect to administration in general and taxation in particular. Nearly all the revenue for such districts is derived from the general property tax; although special assessments sometimes carry a substantial part of the cost of drainage, irrigation, roads, and some other improvements.

The problem of lightening the tax burden. It may be that a tax-conscious people can find a way to free themselves from some of the burdens imposed by taxing authorities; but the problem is far from simple, and the writer has few solutions to offer. He does, however, venture to say that "to deprive one taxing body out of every three" of its powers would be an extremely unscientific solution. Equally unscientific and uneconomic is the proposal (often heard in "hard times") to reduce tax levies in general by cutting expenditures 25 per cent for all purposes—penitentiaries, roads, schools, hospitals, parks—with no regard for the difference in services rendered. Fixing a rigid tax limit is also open to grave objections.

Approaching the subject affirmatively, it is suggested that the administrative departments—national, state, city, and county—could be reorganized in such a way as to effect some savings without sacrifice in service. Some administrative agencies could be discontinued and some could be consolidated. More could be saved by careful and continuous supervision of the spending departments. Too often departments take an appropriation as an order to spend, rather than as an authorization to spend. The number of public employees and officers could be reduced without impairing existing functions of government. Particularly, could we well afford to dispense with a number of political officers whose duties are performed by civil servants, thus costing the taxpayers double. This is double taxation of a different character from that of which complaint is commonly made.

An approach to the tax problem which is usually avoided by those who complain most bitterly of taxes is that made by the tax reformer. Our tax systems could be so improved that the present burden would be more fairly distributed. It is notorious that existing tax laws, particu-

larly in state and local areas, are often far out of line with the principle of "ability to pay." Tax reform is certainly equal in importance to tax reduction.

Finally, there is no doubt whatever that the nation's total tax bill is going to be very high for years to come. War is increasing the national debt at the rate of several billions each month, and the cessation of hostilities will not bring about immediate restoration of "pay as you go" government. Furthermore, states and local communities will probably be compelled to increase their levies during the war or soon thereafter. The total tax bill of twelve or fourteen billions of dollars which we paid with much groaning a few short years ago is probably not half the bill we will be paying annually for many years following the peace. Americans will have to learn to pay high taxes and "like it," if they are going to be happy. The alternative is chaos.

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Commerce and Business: Their Regulation and Promotion

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Civilized society depends very largely upon the exchange of goods and other commercial transactions. One of the chief cares of governments is to regulate and promote such business activity. The purpose of this chapter is to show what our national, state, and local governments have done and are doing in this domain. Since the national government has large and ever expanding powers over commerce and business, its activities will receive more extended treatment than those of the other governments.

Commerce defined. What is commerce? In a notable decision, Chief Justice Marshall said: "Commerce, undoubtedly, is traffic, but it is something more, it is intercourse."¹ It includes transportation and communication by sea, land, and air. Gas and oil transported by pipe lines are subjects of commerce. So are telegraph, telephone, and radio messages. Not every business is commerce, however. Insurance is not commerce, even though a company may do business in every state in the Union and in foreign countries. Nor is mining or manufacturing commerce. Transportation or communication must be directly involved in order to bring a business under the term "commerce." The facts that letters and contracts must be mailed in carrying on the insurance business and that the products of a mine are intended for shipment do not make commerce of insurance and mining.

Power of Congress over commerce. Congress is given the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." This power is subject to only one specific limitation—that no duty shall be levied on exports. It is important to note the extent of this power. It was stated a moment ago that manufacturing is not commerce, and that is correct. But the instant a manufacturer in one state places an article in the hands of a carrier to be shipped into another state or to a foreign country, the article becomes the subject of interstate or foreign commerce and remains so until the carrier delivers it. A person who boards a train in Chicago for New York is an interstate passenger from the beginning of the journey until

¹ *Gibbons v. Ogden*, 9 Wheaton 1 (1824).

its end, not simply at points where the train crosses state lines. Sixty years ago it was held that a steamer plying entirely within the state of Michigan was engaged in interstate commerce because it carried some goods destined for points *outside* the state.² All persons and things in interstate and foreign commerce and the agencies conducting that commerce fall under the regulatory power of Congress.

Since 1935 acts of Congress and decisions of the Supreme Court have extended the national power over commerce. In order to come within the sphere of national regulation it is not necessary that a transaction be one in interstate or foreign commerce. Thus, the federal power may be extended to regulate the price of coal sold in, or the sale of which directly affects, interstate commerce;³ and Congress may legislate on labor disputes and hours and wages in these mining industries. Similarly, Congress may regulate the hours and wages of labor in those manufacturing establishments which make goods for shipment in interstate commerce.⁴ The decisions of the Court on these questions were practically revolutionary, overruling several earlier and significant decisions which had limited the national authority over commerce. Although Congress has made wide use of its commerce power in recent years, it still sees fit to leave many details of that commerce unregulated, or to allow the states to exercise the regulatory authority. State or local regulation has often been applied in respect to the speed of trains, stops, safety at grade crossings, and in other matters of local concern. Of course, intrastate commerce is entirely under state control as long as it is not essentially connected with interstate or foreign commerce.

I. FOREIGN COMMERCE AND BUSINESS⁵

We are now ready to consider how Congress has exercised its plenary powers over foreign commerce and how it has aided American business in foreign countries. It has passed laws for the protection and convenience of shippers, seamen, and passengers; has fostered a merchant marine; has found business opportunities abroad for Americans and extended them protection in such business; and has attempted, through tariff laws, to strengthen American industry at home. It is observed that much more is done for the promotion of commerce than is done in the way of restrictive regulation.

² *The Daniel Ball*, 10 Wall. 557 (1871).

³ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

⁴ *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

⁵ J. G. B. Hutchins, "One Hundred and Fifty Years of American Navigation Policy," *Quarterly Journal of Economics* (Feb., 1939), LIII, 238; R. L. Kramer, Ed., "Our Foreign Commerce in Peace and War," *The Annals of the Am. Acad. of Pol. and Soc. Sci.*, CCXI (Sept., 1940); U.S. Maritime Commission, *Economic Survey of the American Merchant Marine* (1937); B. H. Williams, *Economic Foreign Policy of the United States* (1929); *Annual Reports of the Secretary of Commerce*.

Protection of passengers and seamen. Various laws have been made for the protection of passengers and seamen. For the enforcement of these and other navigation and inspection laws, Congress has established the Bureau of Navigation and the Steamboat Inspection Service. American ships must be inspected; and their masters, pilots, and other officers must be examined and licensed by officers of the services just mentioned. Sailing for a foreign port, a vessel must carry a passport, which it deposits with the American consul upon its arrival. Incidentally, consular officers are given considerable authority in applying our navigation laws to American merchantmen abroad. Passengers are protected by legal limitations as to the number a ship may carry, and by requirements as to health precautions and safety appliances. Thus, as long ago as 1882, Congress provided in some detail for the accommodations of steerage passengers, in such particulars as the space to be allotted to each passenger, ventilation, cleanliness, medical facilities, and the like. Elaborate regulations have been made respecting the rights and duties of officers and seamen, particularly concerning the conditions of employment and wages of seamen.

Aids to navigation. Numerous aids to navigation are provided by the services which chart and patrol the seas, both within our territorial waters and on the high seas. The Coast and Geodetic Survey of the Department of Commerce makes hydrographic and topographic studies of the coasts of the United States and the territories, observes the behavior of tides and currents, prepares charts, and performs similar useful services. The Lighthouse Service, now administered by the Coast Guard, serves coast lines and rivers totaling some 41,000 miles. It maintains about 20,000 marine aids to navigation, including ordinary lighthouses, radio beacons, and lightships. The Coast Guard also maintains an ice patrol. In the spring and early summer it is particularly active along the transatlantic steamship lanes, finding and keeping chartered icebergs and field ice, and reporting its observations for the protection of shipping. These are but a few of the efforts made by the national government to gain scientific knowledge of the seas and keep them safe for commerce.

Merchant marine policy. In the early days of the Republic, American ships were common sights in foreign ports, and they carried their legitimate share of the world's commerce. With the advent of the steamer, Americans found competition more difficult to meet, and to add to their difficulties, on the eve of the Civil War, Congress repealed a subsidy it had previously granted them. For some time thereafter American ships did not play an important part in world trade, despite some attempt to encourage them by levying tonnage duties upon foreign vessels coming into American ports and by imposing higher duties upon goods brought in by foreign vessels than upon goods imported in American vessels.

The First World War drew many foreign ships out of the American carrying trade, and we found ourselves with excellent markets in Europe and with not enough vessels to carry the goods to them. In order to meet this emergency, Congress created (1916) the Shipping Board and endowed it with the power to purchase, construct, lease, and operate merchant ships, and to encourage and promote American shipping generally. Upon our entrance into the war, Congress set up the Emergency Fleet Corporation, which, under the general supervision of the Shipping Board, and generously aided from the national treasury, built ships with such astonishing rapidity that in a few years we possessed a great merchant fleet.

With the war emergency passed, what should the government do with these ships? "Sell them to private interests at a small fraction of their cost and pay them a subsidy to operate them," said those who wanted to get the government out of the shipping business as soon as possible. This proposal was opposed by progressives; but in the end, it was substantially adopted. By an act of 1920, Congress, while directing the Shipping Board to continue and expand its activities, also directed it to sell its ships as soon as possible to American companies. The Board still continued to operate a number of ships; but it sold its finest vessels to private interests at rather low figures. Private companies were also aided by the government through loans for the construction and improvement of vessels and by mail contracts so generous in their terms that they amount in effect to liberal subsidies.

The Merchant Marine Act of 1936. The Merchant Marine Act of 1936 created the United States Maritime Commission and transferred to it the functions of the Shipping Board. The policy declared in the act is as follows: "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (1) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States . . . (2) capable of serving as a naval and military auxiliary in time of war or national emergency, (3) owned and operated . . . by citizens of the United States insofar as may be practicable, and (4) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel."

The Maritime Commission is charged with the duty of creating an adequate and well-balanced merchant fleet to provide for the needs of all routes essential for the flow of the foreign commerce of the United States. Of particular significance is the power of the Commission to administer construction and operating subsidies. To aid a citizen in the construction of a new vessel to be used on a desirable route in foreign commerce, the Commission is empowered to have the vessel constructed

in the United States, to pay the cost of construction, and then sell the vessel to the citizen for an amount equal to the estimated cost of the construction of the vessel if it were constructed abroad. In no case, however, may this "construction-differential subsidy," as it is called, exceed 50 per cent of the cost of the vessel. On a somewhat similar plan, the Commission is authorized to administer an "operating-differential subsidy," designed to place the operation of American ships on a parity with those of foreign competitors. The arrangement made in these cases is that the American owner be paid a subsidy equal to the amount it costs to operate less the amount it costs his foreign competitor to operate. There does not appear to be much doubt that the United States will have a large merchant marine if the purposes of the Act of 1936 are carried out.

Before the outbreak of the Second World War, the Commission had provided for a ship-construction program which called for 500 ships in ten years. This program has been accelerated many fold since 1940. The construction of vessels for the Liberty Fleet, tankers, and other vessels primarily for wartime requirements, is an achievement in which all America has taken pride. The War Shipping Administration (whose Administrator is also Chairman of the Maritime Commission), established in February, 1942, now has charge of the operation, purchase, and use of vessels. All vessels under the control of the Shipping Administration constitute a pool to be allocated for use by the armed forces of the United States in accordance with strategic requirements. After this war we shall probably have another merchant marine act, an act providing for the operation or disposition, or both, of the hundreds of vessels built at almost incredible speed (and at cost to match) for the purpose of supplying the American expeditionary forces.

The coasting trade. Strictly speaking, the coasting trade is not a part of our foreign commerce; but it is at least sea trade, and it may be appropriately mentioned at this point. Congress has appropriated enormous sums for the improvement of harbors, rivers, channels, and the like. The Panama Canal, a great benefit to both foreign and coasting trade, is the most familiar example of such enterprises. All of these improvements except the Panama Canal are open to American vessels without charge. Congress planned to allow our vessels free use of the Canal; but a treaty with Great Britain obligated us to open it to the vessels of all nations on the same terms, and President Wilson persuaded Congress to repeal the provision exempting Americans from the payment of tolls. Not only has Congress generously opened improved waterways to Americans; but the domestic trade has been reserved to American vessels during the greater part of our history. This exclusive privilege gives American vessels a greater advantage than might at first appear; for the coasting

trade includes not only trade between points on the coasts of continental United States, but trade with the overseas possessions as well. It should be added, however, that vessels of certain foreign countries may still engage in this overseas trade.⁶

Promoting American business abroad. Closely associated with the development of American shipping is the policy of finding opportunities abroad for American business. In order to remove the restrictions which surrounded our trade in China and with an altruistic belief that "it was commerce that republicanized and civilized men," as one congressman expressed it, we sent thither in 1844, Caleb Cushing, who secured rights of trade and tariff concessions for Americans. Then followed, a decade later, Commodore Perry's picturesque negotiations with the Japanese, which resulted in opening up trade with that Empire. Even before those days, American diplomats and consuls were often busy with negotiations, investigations, and other activities in the interest of American trade. As we grew into a great commercial nation following the Civil War, these activities increased. Active on behalf of American trade in all countries, the State Department has at times taken aggressive action for American interests in China and certain countries to the south of us. On occasion the President himself has offered a hand, as when Mr. Taft communicated directly with the Prince Regent in China urging the use of American capital for the development of China. The diplomatic service has rapidly expanded its commercial functions since 1900, and the consular service has always made such functions its chief concern.

FOREIGN SERVICE OF THE DEPARTMENT OF COMMERCE. Supplementing the diplomatic and consular officials is the foreign service section of the Bureau of Foreign and Domestic Commerce. Its representatives collect and distribute information on foreign markets, assist in adjusting misunderstandings arising over commercial transactions, explain foreign tariff classifications, give advice concerning the integrity and financial standing of foreign buyers, and so on. The Bureau is credited with having opened up markets abroad which American business hardly hoped to enter. Thus, an airplane company writes the Bureau: "It is very probable that the contracts might not have been obtained had it not been for the services which your organization was able to extend." In the Dutch East Indies, a manufacturer of cosmetics thanks the Bureau for a business connection made for him by the organization's Winnipeg of-

⁶ Inland water transportation likewise receives marked encouragement from Congress. The best example of this is furnished by the government's operation of a barge line from Illinois and Minnesota to the Gulf of Mexico. This enterprise is opposed by certain railroad interests and in general by those who want to "get the government out of business." In 1932 the United States and Canada signed a treaty (not yet ratified) in which they agreed to develop jointly the St. Lawrence, so that ocean-going vessels might enter the Lake ports.

fice. An exporter of electric refrigerators states that he secured business with a French firm through a recommendation by the Bureau's office in Paris—to mention only three concrete examples.⁷

The Bureau's men were ubiquitous and indefatigable in the aid of American business in the days when Mr. Hoover headed the Department of Commerce and they did their best to keep the channels of trade open during his unhappy years as President. In 1933 the new Administration reduced the number and activities of the foreign commerce representatives, but the Bureau continued its general policy of trade promotion. The Bureau makes reports (thousands of them) on foreign commodities; compiles and analyzes data on American investments abroad, foreign investments in the United States, and on various other matters relating to international trade; and undertakes special studies on such questions as the effects of orders freezing foreign assets in the United States and the effects of exchange restrictions. Since 1939 much of the activity of the Bureau is in watching, measuring, and reporting the dislocations of established trade and exchange arising as a result of the war. The Bureau studies and reports not only on the short-range effects of such changes but also on their probable long-range implications.⁸

OTHER AIDS TO FOREIGN COMMERCE. In its efforts to promote foreign trade, Congress, through the Webb-Pomerene Act of 1918, practically exempted export associations from the operation of the antitrust laws. About the same time Congress authorized national banking associations to establish branches in foreign countries, and authorized the chartering of private corporations for the purpose of engaging in international and foreign banking. In 1934 export-import banks were created by executive order. In the same year foreign-trade zones (called "free ports" in Europe) were authorized for American ports of entry. These zones are small areas in which foreign goods intended for trans-shipment to other foreign countries may be stored and processed, free of duty. The Foreign Trade Zones Board, which consists of the Secretaries of Commerce, the Treasury, and War, must pass upon the application of a city for a zone. It is believed that this arrangement might prove to be a decided aid to foreign trade, although only two or three zones have as yet been established.

VALUE OF FOREIGN TRADE. The prosperity of the country depends a great deal upon our exports. Basic products which must rely rather heavily upon export trade include iron and steel in Pennsylvania, automobiles in Michigan, meat packing and milling in the Northwest (both very definitely affecting the prosperity of the farmer), lumber in the Far Northwest, petroleum in the Southwest, tobacco and cotton in the South, and fruits in Florida and the Far West. It is clear that the capitalist,

⁷ *Report of the Secretary of Commerce* (1930), pp. 103-105.

⁸ *Ibid.* (1941), pp. 15 ff.

the industrial laborer, and the farmer in practically every section of the country have a definite interest in the state of the export trade. In 1929 this trade amounted to about five billion dollars. The general business decline which started almost imperceptibly in the summer of 1929 reduced this amount to less than half in 1932. There is no question that this falling off in foreign sales caused some factories to close, increased the number of idle workmen, and decreased the price of farm products. These facts indicate something of the relation of foreign trade to general prosperity. We may object to government activity which unduly favors the export business of particular groups at the expense of others; but an objection to a broad and fair policy of finding markets abroad is hardly in order.

Tariffs and world trade. The tariff, briefly discussed in the preceding chapter, should also be mentioned in connection with foreign trade. While the government makes vigorous efforts to promote American exports, at the behest of various interests it severely restricts imports. This restriction is imposed through the "protective tariff," long the main plank in Republican platforms, resisted in varying degrees by the Democrats for many years, but now embraced by the majority of the leaders of that party also. The idea is, of course, to keep the home market for American producers; to give American industries a reasonable profit and American labor high wages. It is impossible for experts to agree upon what tariff rates are necessary to bring about these results, and manufacturers seeking the "reasonable profit" through the aid of the tariff exert tremendous pressure upon congressmen, making the problem still more difficult. The tendency is for tariffs to go up, each nation maneuvering to get a position favorable to its industry and commerce.⁹ For example, our Hawley-Smoot Tariff Act of 1930 raised the duty on about 650 articles of international commerce. This, of course, made it more difficult for foreign business to export to the United States.

Partly in retaliation for our high tariff rates and partly in the hope of improving their domestic commercial activity, many countries proceeded to increase their tariff rates and to impose other commercial restrictions. Canada shaped her tariff laws so as to transfer to Great Britain purchases which had previously been made in the United States. Mexico increased the duties on wheat and flour, products imported largely from the United States. Twenty-nine nations in Europe and Latin America revised their tariffs upward in 1930, and Great Britain deserted her historic free-trade policy the next year. In addition to increasing the tariff rates, a number of countries have resorted to other restrictions such as the quota system, by which only limited quantities of certain commodities may be imported. Thus, each country tries to keep the home mar-

⁹ On these points see Charles Merz, "Tariff Walls Rise as World Trade Falls," *New York Times*, Sec. 9, p. 1, March 27, 1932.

ket for its own industry, with the rather natural result that world trade is severely handicapped.

Faced with the great need of restoring foreign trade and realizing that prompt action was necessary to meet the rapid changes in the commercial policies of other nations, the President forced a reluctant Congress to pass the Reciprocal Tariff Act in 1934. This "bargain" tariff act was briefly discussed in Chapter 21, Section III.

Foreign loans. Lending and borrowing money is not commerce within the meaning of the commerce clause of the Constitution; but foreign loans are very definitely connected with foreign trade. Before the First World War Americans were making some investments abroad and during the war and for a short time after its conclusion the United States advanced huge sums to our military associates. This money was used to purchase goods in the United States. Since only a very small part of these loans were ever repaid, the American taxpayer has really carried the burden. For some years following 1921, the State Department exercised some scrutiny over private loans to foreign countries. In 1922 it announced that "the flotation of foreign bond issues in the American market is assuming an increasing importance, and on account of the bearing of such operations upon the proper conduct of affairs it is hoped that American concerns that contemplate making foreign loans will inform the Department of State in due time of the essential facts and of subsequent developments of importance. . . . The Department of State cannot, of course, require American bankers to consult it," but "the Department believes that in view of the possible national interests involved it should have the opportunity of saying to the underwriters concerned, should it appear advisable to do so, that there is or is not objection to any particular issue."¹⁰

Following this policy, the administration sometimes withheld its approval from proposed private loans to countries which had not funded their war debts to the United States. In February, 1928, the Department of State, in disapproving a proposed private loan to Russia, took occasion to announce that it did not "view with favor financial arrangements designed to facilitate in any way the sale of Soviet bonds in the United States." The Department scrutinized private loans to several countries in the Caribbean area, and its approval was given in such a way as to indicate its strong support.¹¹ These loans to foreign countries were often used to buy goods in the United States. The statement was made a moment ago that one country can not export goods to another unless it imports from that other country. It is possible, however, to export without importing, for a time, if credits are available for the country buying our goods. This was the situation for a few years preceding the world

¹⁰ Quoted in J. C. Malin, *The United States After the World War* (1930), p. 326.

¹¹ *Ibid.*, pp. 326 ff.

economic collapse, when it was discovered that those who had financed these purchases had lost a large part of their loans. There are many occasions when foreign loans are advisable, but it is possible that more caution will be exercised in making such investments in the future.

The tens of billions which the United States is now pouring into foreign countries through loans and lend-lease agreements come not from private lenders but from the Federal Treasury (the American taxpayers). These loans are investments for the winning of the war, and they should not be judged as ordinary commercial transactions. With the conclusion of peace, not the least of the problems which will tax to the utmost the statesmen of the reconstruction period will be that of how to adjust these obligations so that the stream of international commerce will flow again. Ignorant men and demagogues will arise and say that "*they* must pay back every penny, and *they* must not be allowed to pay it back in goods." If this leadership is followed, then there is no hope. If we want more than a "token" back we must accept foreign goods, a great deal of which, by the way, will come in very handy.

II. THE REGULATION AND PROMOTION OF DOMESTIC COMMERCE

A. Railroads ¹²

Transportation before the railroads. Commerce, interstate and intrastate, was very primitive in the early days of the Republic. Transportation by land was hardly any further advanced than it was in medieval times. The question of regulation did not present itself. The task was to build and improve highways and develop internal waterways. The national government constructed the Cumberland Road, which ran from the town of that name in Maryland to Wheeling, on the Ohio River. This road was finally (1840) extended to Vandalia, Illinois. Despite continued agitation for national road construction, states' rights and states' responsibility theories prompted those in authority to resist further demands on the federal treasury. Left to themselves, the states gave some attention to highways, but much more attention and money to the construction of canals. The most important of these was the Erie Canal in New York, which before its completion (1825) was paying dividends and which cut freight rates from New York City to Buffalo by nearly 90 per cent. Many other states proceeded to build canals, often without counting the cost of construction and with unjustified hopes of large returns on the investments. The result was bankruptcy or near bankruptcy.

The period of promotion. With railroad construction beginning

¹² *Annual Reports of the Interstate Commerce Commission*; S. Daggett, *Principles of Inland Transportation* (1928); I. L. Sharfman, *The Interstate Commerce Commission*, 4 vols. (1931-1937); G. L. Wilson, ed., "Railroads and Government," *Annals of the Am. Acad. of Pol. and Soc. Sci.*, CLXXXVII (September, 1936).

about the time the canal ventures were failing, the states found it necessary to leave the new enterprises largely to private corporations. But when it became clear that railroads could play a leading part in opening up a vast continent, governments supplied aid. Thus, in 1850 the Illinois Central received 2,500,000 acres of land from the national government, and grants to other roads ran the total up to 19,000,000 acres in 1856.¹³ But this was just the beginning. Following the Civil War, the federal government gave to eager and sometimes unscrupulous railway promoters enough land for a great empire, the transcontinental companies alone receiving about 100,000,000 acres. Not only did the companies receive land; but the federal government, a number of the states, and even the cities, came to their aid with liberal financial assistance.¹⁴ This liberality, even prodigality, is easily understood when we consider the importance of the railroads in the general plan of making the nation a great economic unit. In fairness to the railroads it should be stated that not all of them made immense profits from land grants. Some of them practically gave the land away to get the country settled, and others have had to pay taxes on land which settlers did not want.

The period of nonregulation. After the Civil War, railroads engaged the attention of the great business promoters. "Commodore" Vanderbilt sold his ships and turned to railroads, thereby multiplying his fortune by ten in about that number of years. Such hard-fisted men of business vision performed a great service in giving the country a transportation system; but the methods they employed sometimes corresponded more closely to the practices of the medieval robber barons than to modern ethical standards. A few big men on the inside manipulated stocks with a total disregard for the interests of the ordinary stockholder. And, what was much worse, the rank and file of shippers were at the mercy of the roads, both in respect to service and rates. The published rates meant little, since the policy of the roads was to charge the ordinary shippers all they could pay and to grant to the biggest patrons whatever concessions seemed necessary. For example, three great railway companies held small oil men to regular freight rates; but they gave a rebate to a colossal oil company. Not only that, but they paid over to the large oil company a commission on every barrel of oil they carried for the small oil concerns! A shipper might be charged more for a 100-mile haul than for a 200-mile haul. This came about because a railway company ordinarily had no competitor for short hauls. Competition among the roads often led to rate wars in which both sides sometimes lost. Being practical men, the railway officials soon came to see that they could better further their interests by reaching an understanding. Competing roads formed pools, dividing the traffic on a percentage basis and apportioning the

¹³ R. V. Harlow, *The Growth of the United States* (1925), p. 382.

¹⁴ C. A. and Wm. Beard, *The American Leviathan* (1930), pp. 398-399.

profits and losses accordingly. Against this monopoly the general public was helpless. Formerly, shippers might profit occasionally by a rate war; now the railroads, no longer fighting each other, could concentrate upon their common objective—collecting all the traffic would bear, all the time.¹⁵

RAILROADS AND STATE POLITICS. These and many other abuses were known to exist; but little could be done to stop them because of the alliance of railroad men and politicians. Railroads were most liberal in furnishing passes to public men. They went to state legislatures and almost openly bribed the members. It sometimes happened that competing companies were seeking legislative favors, occasions which offered the greatest financial opportunities to legislators. Railroad financiers contributed handsomely to the coffers of both political parties. Said Jay Gould of the Erie Railroad: "In a Republican district I was a Republican; in a Democratic district I was a Democrat; in a doubtful district I was doubtful; but I was always Erie."¹⁶ The corrupt alliance of railroads and politicians was profitable to both parties. Private pockets and party war chests received the funds, and the railroads had immunity from governmental interference. A number of states did manage to pass regulatory laws, but these were often evaded. When an associate told "Commodore" Vanderbilt that his transactions were forbidden by the laws of New York, he replied: "My God, John, you don't suppose you can run a railroad in accordance with the statutes of New York, do you?"¹⁷ The railroads were entirely too big and powerful for the states to handle, and the great promoters understood this thoroughly.

National regulation. For some time, various progressive groups had urged the need of national regulation of railroads. Following an investigation which revealed the conditions outlined above and many other abuses, Congress passed the Interstate Commerce Act of 1887. This was an important step. For one thing, it introduced the principle of national control of interstate railways. The act declared that rates should be just and reasonable, prohibited pooling, forbade rebates and special privileges to particular shippers, and contained other provisions designed to prevent unjust practices. It established the Interstate Commerce Commission, with powers to conduct investigations and to issue orders to carry the act into effect. But the railroad companies were definitely hostile to the Commission and the courts were often unfriendly to it, and since no railroad was obligated to obey an order of the Commission until the courts had sustained the order, the Commission was, for the time being, relatively ineffective.

The year 1906 is the next important date in railway legislation. The

¹⁵ Harlow, *op. cit.*, pp. 588-589.

¹⁶ Quoted in E. M. Sait, *American Parties and Elections* (1942 ed.), p. 330.

¹⁷ Quoted in Harlow, *op. cit.*, p. 584.

Hepburn Act of that year extended the Interstate Commerce Act to express and sleeping car companies, enlarged the personnel of the Commission, and increased and broadened its power in many respects, especially in the matter of fixing rates and issuing orders. By the Hepburn Act, a policy of vigorous regulation of common carriers was definitely undertaken. No longer could it be said that the national government was only toying with the idea of regulation. We mention yet four other commerce acts. The Transportation Act of 1920 still further extended the scope of federal regulation, but it was affirmative and constructive in that its aim was "to build up a system of railways prepared to handle promptly all the interstate traffic of the country."¹⁸ The Emergency Transportation Act of 1933 had the same general purpose, but it went much farther. The Motor Carrier Act of 1935 brought interstate motor transportation within the field of regulation, and the Transportation Act of 1940 did the same for inland and coastal water transportation. Both of these acts emphasize the unity of transportation—water, highway, and rail.

Present status of restrictive regulation. In the next few paragraphs we shall consider the restrictive phases of present-day railroad regulation. The pages which conclude this section deal with the newer aspects of the problem—government encouragement and assistance.

1. **GENERAL REGULATIONS.** Considering the regulations which apply particularly to railroads, what do we find? There are a number of prohibitions and restrictions. No longer may railway companies issue passes to petty politicians and others who have no legitimate claim upon the railroads. Persons and firms who formerly received rebates and other special transportation favors now find that they are forbidden by law. Then, of course, there is the requirement that rates shall be just and reasonable. Pooling is on the list of prohibitions, although the Interstate Commerce Commission may allow it when it seems to be in the interest of better service. Railway promoters may no longer play fast and loose in issuing securities. Such issues must have the consent of the Commission. By an act of 1933, railway holding companies, which long thwarted the Commission, are brought under its control. If a railroad has a direct financial interest in a product, it is forbidden to transport it, although timber and its products are excepted from this rule. Railroads are also forbidden to have an interest in a competing water carrier; but here again, a few exceptions are permitted. These and other restrictions are accompanied by more or less appropriate penalties for their violation. Affirmative regulations are found in the requirements that the carriers shall publish their rates, make annual reports to the Interstate Commerce Commission, and keep their accounts on forms prescribed by the Commission.

¹⁸ *Dayton-Goose Creek Ry. v. U.S.*, 263 U.S. 456, 478 (1924).

2. **SAFETY LEGISLATION.** A field of railway legislation which assumed great importance years ago is that of safety. It became impossible for the states to deal with this problem when railroads became interstate; for uniformity was essential, and each state had its own peculiar safety requirements. Beginning with the Safety Appliance Act of 1893, Congress enacted a series of measures which very largely superseded existing state legislation and practically prevented the enactment of additional state laws on the subject. The first act required that cars be equipped with secure grab irons or handholds, automatic couplers, and continuous brakes and prescribed driving-wheel brakes for locomotives. These and similar safety requirements were made applicable not only to interstate commerce trains, but to all cars and locomotives used on railroads engaged in interstate commerce. In 1911 Congress interested itself in locomotive boilers, establishing the requirement that steam boilers must be inspected and tested from time to time to the end that no one be placed in "unnecessary peril to life or limb." Four years later boiler inspection was expanded to inspection and regulation of the entire locomotive, and the states were held to be completely excluded from this field of regulation. By the Transportation Act of 1920 the Interstate Commerce Commission was given authority to require railroads to install some automatic system of train control. Just when any particular railroad should be required to install such a device was left to the discretion of the Commission. Thousands of miles of track have been placed under an automatic control system.

Not only has Congress sought to insure the safety of railroad employees and travelers by requiring the use of various safety devices of a mechanical nature; but it has also promoted safety by legislation designed to reduce human error in the operation of trains. Thus, to avoid accidents growing out of great fatigue of employees, railroads are forbidden, by an act of 1907, to keep trainmen on duty more than sixteen hours in any day. Other acts, while not aimed primarily at promoting safety, have at least improved relations between employees and employers and thus brought about a better service for the public. Among these acts may be mentioned the Second Employers' Liability Act (1908), the Adamson Act (1916), the Railway Labor Act of 1926 (amended 1934), the Railway Pension Acts of 1934 and 1935, and the Railroad Unemployment Insurance Act of 1938.¹⁹

The Interstate Commerce Commission. It is manifestly impossible for Congress itself to exercise any minute control over the railroads. Congress passes general laws, and wisely leaves the details of their application to the Interstate Commerce Commission. This body of eleven men, with its large staff of technical assistants, is one of the most important administrative agencies of the national government. The compre-

¹⁹ See Ch. 23, sec. I.

hensive powers of the Commission are well illustrated by a few provisions of the Transportation Act of 1920. The consolidation of railroads into a limited number of systems is authorized, subject to the approval of the Commission. Incidentally, this authority to consolidate marks a very definite turn from restrictive to constructive regulation of railroads. The act prohibits the issue of railroad securities except under authority granted by the Commission. It empowers the Commission, under normal conditions, to establish rules and regulations in respect to car service, and, in emergencies, to direct such service in whatever manner best promotes the interest of the public.

Most important of all, the Commission is given wide powers over rates. This power is exceedingly difficult to administer. Until 1933 just and reasonable rates were determined by the value of railway properties and wise men seemed to differ fundamentally as to just how they should be evaluated. In the year mentioned a significant change was made in rate-making. As amended, the Interstate Commerce Act requires the I.C.C. to give "due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers under honest, economical, and efficient management, to provide such service." In the exercise of its far-reaching authority, the Commission is empowered to make extensive investigations, to compel the attendance of witnesses and the production of records, to direct the federal district attorneys to prosecute violators of the interstate commerce acts, and to issue various orders. While the Commission is often spoken of as the "supreme court of American transportation," this title is subject to some modification in view of the fact that its orders are subject to review by the regular federal courts.

Decline of state control over railroads. As the national government has exercised its interstate commerce power in respect to the railroads, state regulation has been considerably restricted. To be sure, the states still have the authority to control interstate commerce; but where there is a reasonable relation between interstate and intrastate commerce, the national regulation of the former supersedes state regulation of the latter. Thus, the national safety requirements are applicable to intrastate trains operating on through-state lines, since such trains, if not equipped with proper safety appliances, constitute a clear and present danger to interstate commerce. The same principle is applied to rates. Texas fixed freight rates within that state in such a way as to favor certain of her cities and to discriminate against Shreveport, Louisiana. The Interstate Commerce Commission ordered the railroads to cease making these discriminatory charges, and the order was sustained by the Supreme Court of the United States.²⁰

A still more important decision grew out of the Transportation Act

²⁰ *Houston Ry. v. U.S.*, 234 U.S. 342 (1914).

of 1920. In conformity with the purpose of this act to give the railroads a fair return on their properties, the Interstate Commerce Commission granted an increase in rates. Wisconsin claimed that she could still control local rates, and refused to adopt the rates fixed by the Commission. The Supreme Court held that an adequate national transportation system with a fair return to the railroads on their property value could not be secured with each state fixing local rates, and therefore upheld the Commission's order that all intrastate rates which affected interstate commerce should conform to the rates for the latter.²¹

It should not be assumed, however, that the states have been completely ousted from the domain of railroad legislation. In the case just cited, the Supreme Court declared that it was not depriving the states of their power over intrastate commerce, except where Congress must control such commerce in order to exercise effective control over interstate commerce. We should note also that, in the interest of the health and safety of the public, the states may impose certain minor regulations upon interstate trains, such as the requirement that they shall slow down at grade crossings.²²

Newer aspects of the railroad problem. A generation ago "railways were collectively represented as an ogre, a vicious monopoly, the farmers' foe, and the shady stock speculator's darling."²³ In our time, regulation has reduced abuses to such an extent that we commonly think of railroads as trusted public servants. The problem of regulation is no longer the burning issue. Our chief concern is keeping the railroads out of financial straits and aiding them with organization plans, to the end that the nation may have an adequate system of transportation.

From 1929 until recently, when war business strained their capacity, the railroads were in a very unsatisfactory financial condition. The Reconstruction Finance Corporation (1932) although established primarily for the purpose of helping banks and similar financial institutions, during the first few months of its existence extended \$170,000,000 of its \$2,000,000,000 credit fund to needy railroads. While the general business decline probably accounted in a large measure for the falling off in railroad earnings, there were other factors to be taken into consideration. Water carriers, pipe lines, airplanes, and motor carriers, particularly the latter, had developed very rapidly as competitors of the railroads. In 1932 the Interstate Commerce Commission made an investigation of motor vehicle operations and recommended federal regulation of motor vehicles engaged in interstate commerce. As noted above this legislation was enacted in 1935, and the Transportation Act of 1940 brought inland and coastal water carriers into the system.

Viewing the railroad problem broadly, it may be said that unrestrained

²¹ *Wisconsin v. C. B. & Q. Ry.*, 257 U.S., 563 (1922).

²² See Ch. 3, sec. I.

²³ *Time*, January 11, 1932, p. 14.

competition, either as between railroads or as between them on the one hand and water and motor carriers on the other, is no longer considered in the public interest. The idea of consolidation and co-ordination, under close government supervision, is now the line of approach to the transportation problem. The act of 1940 emphasized this approach. It created a temporary Board of Investigation and Research and charged it with the duty of investigating the relative economy and fitness of railroad, motor vehicle, and water carriers for transportation service, in order to determine the type of service each form of carrier is best fitted to perform, and the methods which should be encouraged and developed for each, to the end that there may be provided a *national* transportation system adequate for commerce and the national defense.

A few days after the attack on Pearl Harbor, the President established the Office of Defense Transportation, naming as Director Joseph B. Eastman, a member of the I.C.C. and one of the most capable of all federal administrators. This Office has the responsibility of mobilizing the transportation facilities of the country, private and public, as the successful prosecution of the war may require. That the railroads and other carriers have measurably succeeded in meeting these unprecedented demands is a tribute to them and to the Office of Defense Transportation.

B. Highway Construction and Motor Transportation ²⁴

When motor vehicles came into general use, the country became more highway conscious than it had been since the possibilities of canals and railroads had diverted attention from the problem of improving the primitive roads and paths a century earlier. To be sure, there has always been some interest in highway extension and improvement; but as the number of registered motor cars reached 10,000,000, then 20,000,000 and finally 25,000,000, the problem of the construction of highways—national, state, and local—suitable for this new form of transportation increasingly engaged the powerful interest of automobile associations and chambers of commerce, as well as the interest of farmers and car owners in general. The automobile is not only responsible for the vast outlays for highway construction; but being a fast, dangerous, and very common means of transportation, it laid at the doors of all governments the problem of its regulation. We shall deal first with the matter of roads; then with the problem of regulation of motor vehicles.

Highway construction: 1. **LOCAL.** Road construction was primarily a local enterprise until a generation ago, and such work as was done on

²⁴ Fairlie and Kneier, *County Government and Administration* (1930), Ch. XVII; J. J. George, "The Federal Motor Carrier Act of 1935," *Cornell Law Quarterly* (1936), XXI, 249-275; P. G. Hoffman and N. M. Clark, *Several Roads to Safety: A Program to Reduce Automobile Accidents* (1939); V. O. Key, Jr., *The Administration of Federal Grants to the States* (1937); A. F. Macdonald, *American State Government and Administration* (1940 ed.), Ch. XXIII.

roads was often performed in a careless and indifferent manner by the male residents of a community as they gossiped and smoked and had a good time generally in the day or two they worked to pay their "road tax." Local communities still play an important part in the building and care of roads, especially those roads which serve as feeders to the main highways. In the Eastern states the town, and in the majority of other states the county, is the unit for local road administration. The obligation to provide a county with a system of roads belongs to the county board; but there is a commendable and growing tendency to place an engineer in actual charge of road construction. Highway costs are met from the ordinary property tax, the poll and labor tax (in a few states), special assessments of property owners benefited, the gasoline tax, and wheel and vehicle taxes. No state collects road revenues from all of these sources. The present tendency is to rely more upon the gasoline tax and automobile license fees, the state collecting the money and passing part of it down to the counties.

2. STATE. Even before the advent of the automobile, a few states adopted a policy of financing and improving highways; and with the growth of motor transportation, other states rapidly joined their ranks. States have granted funds to counties for highways on condition that the counties pay a substantial part of the cost (often half) and on another important condition that the counties build the roads in accordance with standards fixed by the state. This plan of state aid has usually operated successfully. It has the merits of improving the quality of the highways, of imposing state control without completely depriving the counties of the road function, and of spreading the cost a little more widely.

State-wide highway systems under the exclusive control of the state are becoming more and more common. Under such systems the main roads are selected and designated as state highways, and the county or other local authorities are left to administer farm-to-market roads and byways. In discharging road functions, the states have found it necessary to establish highway commissions or authorities with similar titles. These agencies not only direct state highway construction and maintenance and supervise the local expenditure of state-aid funds, but they also frequently serve as general advisers to county road authorities and in a few cases they have some power of appointment and removal of such authorities. Because of the technical character of highway administration and because the automobile has made the county relatively much smaller than it used to be, the state is now recognized as the proper unit of administration for arterial highways, and experts are generally of the opinion that considerable state control over local highway matters is highly desirable. Indeed, at least two states, North Carolina and Virginia, now assume full responsibility for the construction and maintenance of all roads.

3. NATIONAL. The fight which raged a hundred years ago over the question as to whether the national government should build roads resulted in the retirement of that government from this branch of activity. But with the coming of the automobile and the realization that roads played an important part in national defense, the old question was re-introduced and answered in the affirmative. In 1916 Congress passed the Rural Post Roads Act, by which it authorized the Secretary of Agriculture to spend, in co-operation with the states, over a five-year period, the sum of \$75,000,000 on roads over which the mails were being carried. Five years later the Federal Highway Act authorized expenditures for trunk lines (those forming interstate highway systems) and important connecting highways. From 1921 to 1930 the annual grant was \$75,000,000, and in 1931 it was increased to \$125,000,000. Some grants are made for other than trunk line highways, bringing the total above the last named figure.²⁵

The greater part of these appropriations is divided among the states according to area, population, and the mileage of rural delivery routes, each basis of measurement determining the distribution of a third of the funds. Then there are certain strings attached to the appropriations. No state may receive this federal aid unless it matches the federal dollar. It is a fifty-fifty proposition.²⁶ In the second place, the states must accept a considerable degree of federal supervision in highway construction. The results have been generally satisfactory. A national highway system is being developed through the pooling of funds and expert information on the part of the federal government and the states.

Motor vehicle regulation. The governments have not completed their task when they have collected the money from the motorists and have built the highways. There remains the very important matter of the regulation of traffic. The chief problem is that of safety. As many as 40,000 persons have been killed in a single year on the highways and in the streets, and the number of injured annually is many times 40,000. Aside from the suffering caused by motor accidents, the economic loss reaches a staggering figure. From the little hamlet which imposes a speed limit of fifteen miles an hour to the national government which prepares broad advisory plans of traffic regulation, the civil authorities are concerned with reducing the hazards of motor traffic. Occasionally, the motorist suspects that the regulations imposed by the officers of some village are more the result of resentment at the seeming lack of respect which city folks show for the town as they sail gaily through it than of a genuine desire to make the town safe for pedestrians; but there are cer-

²⁵ *Report of the Secretary of the Treasury*, 1941, p. 648.

²⁶ An exception was made in 1932, when \$400,000,000 was granted without the "matching" requirement.

tainly only a few traffic regulations which are not designed primarily for safety and convenience. State motor vehicle regulations and supplementary municipal ordinances cover what seems to the ordinary individual every possible phase of the subject.

Indeed, the subject is so fully covered that the typical motorist in the typical community probably violates some regulation nearly every time he takes a drive. Laws require that vehicles be registered and that drivers be licensed. They prescribe speed limits, types of lights, drivers' signals, and mufflers. They carefully specify the manner in which trailers may be used, prohibit parking on highways, and fix penalties for the reckless driver—a class which in some states includes the car operator who has in "his or her embrace another person." These and numerous similar regulations conspicuously fail to bring the accident rate down to that minimum number which might be considered unavoidable. The United States Department of Commerce has given assistance to states and cities by sponsoring the National Conference on Street and Highway Safety. Every one of the states has adopted some part or parts of the Uniform Vehicle Code prepared by the Conference, and a number of cities have put its Municipal Traffic Ordinance into effect. This not-too-encouraging degree of uniformity in regulation should be of some value in reducing accidents, particularly since the model regulations were made by a Conference which pooled the experience of every section of the country. It goes almost without saying that the 35-mile speed limit, imposed in 1942 for the purpose of conserving gasoline and rubber, has reduced the accident rate.

THE PROBLEM OF THE COMMERCIAL VEHICLE. The large and increasing use of motor vehicles as common carriers presents a special problem of regulation. In 1934 this motor transportation had reached 45,000 inland communities, and created very telling competition with established rail carriers. While passenger miles of the railroads declined 40 per cent from 1930 to 1934, common carrier buses increased their operation by 10 per cent. Of course, it may be argued with considerable force that the rail carriers lost much business to the buses on account of bad management and high rates. Yet the buses had a great advantage in their relatively small cost of operation and in their freedom from federal regulation.

Whether or not the railroads had been caught asleep at the switch, the Motor Act of 1935 was overdue. The act declares the policy of Congress to be that of regulating such transportation in ways designed to preserve its advantages, protect the public interest, promote efficient and economical service "without unjust discriminations, undue preferences or advantages, and unfair or destructive practices," and co-ordinate it with other forms of transportation. The Interstate Commerce Commission is given

a long list of powers and duties for the purpose of effectuating this policy. There is no doubt that this legislation was much needed, both as a matter of justice to the rail carriers and as a regulation in the public interest.

C. Aviation ²⁷

No doubt men of lively imagination in all periods of history reflected upon the possibility of flying, and legend has it that a Greek, Dædalus, using artificial wings, flew to Sicily! A generation ago our government gave little more encouragement to aviation experimenters than it gave credence to the Dædalus legend. But the First World War forced all governments to develop aviation as an important branch of the fighting services. Since the war the government not only has continued to develop military aviation, but it has very definitely encouraged civil aviation; for experience and training in this branch of flying can be readily made available for military purposes in time of war.

As early as 1918 air mail service was established between Washington and New York, and in the course of a few years nearly all of the important cities were given this service. At the present time our air mail carriers fly over a great network. Originally, the government owned and operated the air mail facilities; but in accordance with the general policy to "keep the government out of business," the service was soon transferred to private concerns. For some years these companies were awarded very liberal mail contracts, the announced purpose being that of encouraging commercial aviation. At present the subsidy is about \$5,000,000 a year and represents less than a fourth of the cost of the air mail service. Aided by such subsidies, air transport companies have developed a passenger service to a point where some railroads are beginning to notice competition.

Not only does the government aid air transportation through its mail contracts, but it stimulates aviation in various other ways. The Air Commerce Act of 1926 placed civil aviation under the fostering care of the Department of Commerce, whose Bureau of Air Commerce administered the act. The Civil Aeronautics Act of 1938 created a new authority, and under the present set-up civil aviation is regulated and promoted by the Civil Aeronautics Administration and the Civil Aeronautics Board which, after a brief period of independent existence, were located in the Department of Commerce. The Administration performs such duties as the following: encourages and fosters air commerce; designates federal airways and acquires, establishes, and maintains air navigation facilities; trains civilian pilots; develops landing areas; and examines airmen and inspects aircraft. The Federal Airways System now comprises a network

²⁷ *Annual Reports of the Secretary of Commerce*; H. S. Leroy, "Civil Aeronautics Authority," *Air Law Review*, IX, 315, Oct., 1938; C. E. Puffer, *Air Transportation* (1941).

of more than 40,000 miles. The Civil Aeronautics Board, among other things, issues certificates of "convenience and necessity" (the authorization to operate) to air carriers; regulates rates for the carriage of persons and property; and otherwise serves as an economic regulator for the airways somewhat as does the I.C.C. for the railways.

Both the Board and the Administration have responsibilities—different ones—for safety and accident prevention. At this writing these agencies, as is true of practically every other federal agency, are giving their energies primarily to those activities which relate to the national defense. After the war civil aviation will without a doubt take another spurt, and the agency or agencies which regulate it will probably become one of the principal regulatory authorities.

*D. Wire and Wireless Communications*²⁸

Telegraph, telephone, and cable lines. Electric communications have been developed primarily by private initiative, although government aid and encouragement have usually been forthcoming. During the First World War the national government took over all such communications and the railroads as well, but returned them to their owners shortly after the conclusion of hostilities. By an act of Congress of January, 1942, the President may, during the present emergency, take over telephone, telegraph, and cable facilities.

Telephone and telegraph companies have many lines in interstate commerce, and are subject to the Federal Communications Commission, which must see that their rates are "just and reasonable" and that they make no unjust discriminations between customers. Another important function of the Commission is to grant hearings for the consolidation of telephone companies and to authorize such consolidations when they are "in the public interest." A considerable number of consolidations have been allowed. Since better telephone service can be provided by monopolies, the program of consolidation under regulation is considered entirely satisfactory. Telegraph communication has been practically monopolistic in character for some time. As for cable lines, none may connect the United States with any foreign country unless licensed by the President. He may withhold or revoke such licenses for the purpose of securing cable rights for Americans in foreign countries or for the purpose of preserving the security of the United States. He has the further duty of enforcing the requirement that cable companies shall charge only just and reasonable rates and maintain adequate service.

Radio. Although radio had been used on ships for some years, citizens

²⁸ *Annual Reports of the Federal Communications Commission*; H. S. Hettinger, Ed., "New Horizons in Radio," *Annals of the Am. Acad. of Pol. and Soc. Sci.*, CCXIII (January, 1941).

in general were not particularly conscious of this revolutionary means of transmitting intelligence until the First World War, and the rush to install receiving sets in millions of American homes is almost within the memory of present-day college students. There are now some two hundred important broadcasting stations and a number of less powerful stations. Ten of thousands of people are employed in various phases of the radio business, and large sums of money are invested in it. Stretching its network through the entire country, extending its waves across international boundaries, possessing the greatest possibilities for good or ill in the life of our people, it was subjected to national regulation in 1927. The regulatory act is now administered by the Federal Communications Commission. Among other significant provisions of the act are those applying the antitrust laws to service and apparatus; the requirement that all candidates for the same public office shall be allowed the same use of radio facilities; and the stipulation that all advertising shall be broadcast as such. The Commission has the responsibility of granting licenses to stations, fixing their wave-lengths, and allotting the time during which they may broadcast. Perhaps the broadest power of the Commission is that of granting and renewing licenses under the guiding principles of "public interest, convenience, and necessity." Although the Commission is forbidden to exercise censorship over communications, it is by no means inconceivable that stations in fear of losing their license, or in panic at the thought of the government's taking over broadcasting, may impose a censorship of their own. Each invention or discovery which confers a blessing upon man seems to leave some problems on his doorstep, and not the least of the problems the radio has brought is the old problem (in a new form) of maintaining free speech. In order to co-ordinate the relationship of all branches of communication to the war program, the Board of War Communications, essentially a planning agency, has been established.

III. THE REGULATION AND PROMOTION OF GENERAL BUSINESS

In the preceding sections we have reviewed the efforts which have been made to promote and regulate water transportation, railroads, motor traffic, civil aeronautics, and electric communications—carriers of goods, passengers, and intelligence. Our attention is now drawn to the regulation and promotion of general business. The subdivisions under which this topic will be treated are: state regulation; federal regulation; and federal aids to business.

A. State Regulation ²⁹

1. **The regulation of ordinary corporations.** The states have probably been more concerned with the regulation of business than they have with its promotion, although the latter element has not been lacking in state laws. As corporate business has developed, regulation in the states has progressed in varying degrees, depending upon the attitude of those in control of the governments.

ISSUING OF CHARTERS. Certain types of business concerns may be chartered by the federal government; but the great majority of corporations have always had to look to the states for charters. The charter is the corporation's authorization to do business. It sets forth the manner in which the corporation shall be organized and the general methods by which it may conduct its business. A century ago it was the common practice of legislatures to grant charters by special acts, but this practice has been generally abandoned. Under the present system, states have general corporation laws, and charters are issued in pursuance of these laws. A group applies to the secretary of state (or whatever authority is empowered to issue charters), who examines the application, makes sure that all terms of law are complied with, and then issues a charter upon receipt of a fee. A corporation is known as "domestic" in the state which issues the charter, and as "foreign" in other states. It is a very common practice for states to admit foreign corporations, a privilege for which they not infrequently exact a higher fee than they require of domestic corporations engaged in the same business. A state may not, however, prevent a corporate or natural person from engaging in interstate commerce, or burden such commerce by requiring a license for its conduct.

CONTINUOUS SUPERVISION. But the states do not issue charters of incorporation or grant foreign corporations the privilege of doing business and then let them pursue their merry course. Most of the states were satisfied with this two generations ago; but in our time they exercise a continuous supervision over business organizations. Corporations are required to make various reports to the secretary of state, or better to a corporation commission. Through an examination of these reports and by other checks, the extent to which a corporation is observing the laws may be determined; and in the case of major violations, the privilege of carrying on business may be revoked. In order to protect the public from security frauds, a great many states have enacted the "blue-sky" laws. The laws prohibit the issue of securities unless approved by state authority, which approval is given only when a company furnishes complete information concerning its financial condition and the nature of the securities it proposes to offer, and designates the property upon which

²⁹ F. G. Crawford, *State Government* (1931), Chs. XXI-XXIII; Macdonald, *op. cit.*, Ch. XXV; W. B. Munro, *Municipal Administration* (1934), Chs. XLI-XLVI.

the securities are to be based. These laws do no more than protect the investor against fraud. He may still make very unwise purchases of securities. If the investor is a "sucker," the laws cannot remove him from that class.

2. **Regulation of corporations affected with a public interest.** Certain types of business are very close to the public, in that practically every citizen must depend upon them. In particular, banks, insurance companies, and public utilities come within this group. Such business is said to be "affected with a public interest." It would be absurd to expect each citizen to determine the soundness of a bank or an insurance company. The state must do what it can to make these concerns safe.

(a) **BANKS.** A brief discussion of the regulation of state banks was given in concluding the section on currency and banking in the last chapter. We therefore turn at once to the regulation of insurance companies.

(b) **INSURANCE.** The public must put its trust and savings in insurance companies as in the banks, and, for the same reason, the states must regulate the business of insurance. State regulation of insurance is more essential than state regulation of banks; for, since insurance is not commerce, nor in any other sense a business which the federal government may regulate, the states are in exclusive control of the subject. Most of the states have exercised this power with considerable energy since New York (1905) investigated the practices of insurance companies. A state administrative authority, often the superintendent of insurance, is required to keep an eye on the assets of the companies, to see that their funds are invested in sound securities, and otherwise to enforce the state laws designed for the protection of policyholders. Some states of the Central West have themselves gone into the insurance business. For example, Wisconsin issues life insurance policies for small amounts; North Dakota and two or three other states insure the farmers' crops against hail; and a larger number insure against industrial accidents. Whether insurance is undertaken by states or by companies chartered by them, it calls not only for honesty but for technical talent of a high order.

(c) **PUBLIC UTILITIES.** Certain other businesses, monopolistic in character, call for special regulation by the states. To this class belong the railroads, bus lines, and telegraph and telephone systems. Concerning these utilities, it may be repeated here that, while the states continue to regulate them in their intrastate business, the federal government, through its power over interstate commerce, has rather effectively entered the field of regulation. Other important utilities, and these are regulated almost exclusively by the states and their local subdivisions, include electric power and gas. State laws govern such subjects as the granting of franchises, the issuing of stocks and bonds, the quality of the service

rendered, the rates to be charged, and, in addition, require reports from the companies.

It is, of course, impossible for these matters to be regulated in detail by law. For specific application of the laws, the states have created state and local public utility commissions, endowing them with powers similar to those held by the national Interstate Commerce Commission. These commissions hold extensive hearings in respect to rates and other matters brought before them by utility companies or the public. Their decisions are always subject to judicial review on points of law, and in many jurisdictions on facts as well. It is manifest that the commissions' duties require a high degree of talent and integrity. There has been some difficulty in finding men with sufficient qualifications to fill these positions. Complaint is made that they are much more likely to side with the companies than with the public. This may be true because men holding the view of the companies are often appointed commissioners, or possibly it is explained by the fact that the companies are usually represented by better legal talent than is the public. There is complaint also that the courts are sometimes unfriendly to the decisions of commissions which favor the public. Granted that the commissions do not and cannot always satisfy the public and that the courts may occasionally block their best efforts, it is generally agreed that commission regulation is superior to the old system, which was essentially that of nonregulation.

A number of cities own their utilities, particularly gas and electric plants. Since small electric plants cannot be conducted economically, a few states have authorized communities to combine in "utility regions." This is a sort of standing threat to power companies to give better rates and services. It does not mean that these communities will immediately enter the power business. The great body of Americans, until recently at least, have looked with disfavor upon public ownership and operation of utilities, preferring to solve the problem by official regulation and informal adjustments with private companies.

B. Federal Regulation ³⁰

The federal government did not enter the field of business regulation in any important sense until a hundred years after the Constitution was adopted. The idea held by the majority of leaders in 1789 was that the government should promote rather than regulate business. The new federal government put American credit on a solid basis, established a sound monetary system, chartered a federal bank, levied a tariff, and passed a tonnage act. Such measures were designed not only for the

³⁰ *Annual Reports of the Federal Trade Commission; Annual Reports of the Attorney General*; T. C. Blaisdell, *The Federal Trade Commission* (1932); H. D. Koontz, *Government Control of Business* (1941).

advantage of the government itself, but also for the improvement of business. This policy of business promotion has continued to our own time. Of the policy of promotion more will be said a little later. For the present we shall consider the government's attitude toward business from the standpoint of regulation.

Federal regulation became necessary when the states found themselves unable to check effectively the great corporations, trusts, and holding companies which grew up in the generation following the Civil War. Often guilty of practices similar to those which had brought many railroads into bad repute, these great business combines shared with the railroads a widespread and often merited public hostility. It is true that the state authorities did not always attempt to limit the operations of the "soulless" corporations and "unspeakable" trusts, for their officers or agents not infrequently "had a way" with legislators. But even with an honest desire to do so, legislatures usually found their powers inadequate; for big business was commonly interstate business and very incompletely subject to state regulation. The solution was to get Congress to undertake the task, using its power over interstate and foreign commerce.

The Sherman Antitrust Act (1890). After considerable deliberation, Congress finally passed the now well-known Sherman Antitrust Act, forbidding "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states" and prescribing heavy penalties for violations of the law. This act was heralded by some almost as a relief from bondage; but there was to be a great deal more of wandering in the wilderness on the trust problem. Supported by the best legal talent against the somewhat indifferent attorneys who represented the government, the trusts won a victory in the first case that came before the Supreme Court.³¹ In that case, certain sugar refineries in Pennsylvania were charged with having combined to secure a monopoly. The government's case was not well prepared, in that it failed to show that the trust controlled the prices and sale of sugar beyond the state line and thus restrained interstate commerce. The court therefore held that the combination complained of was one of manufacturers and that since manufacturing was not interstate commerce the Sherman Act did not apply. The enforcement of the antitrust law lay not heavily upon the conscience of Presidents or federal attorneys in the decade following this decision. The first President to establish a reputation as a "trust buster" was Theodore Roosevelt, who distinguished between "good" and "bad" trusts and proclaimed his hostility for the latter in a manner highly approved by their victims. Yet his record for

³¹ *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). But in a recent case, the *Jones and Laughlin Steel Co.* case (April, 1937), the Supreme Court held that industry, although intrastate when separately considered, might have activities so closely and substantially related to interstate commerce as to bring it under the regulatory power of Congress.

dissolving trusts is not particularly impressive, although a notable victory was won when the Supreme Court dissolved the Northern Securities Company, an organization which held the securities of the Great Northern and the Northern Pacific railroads in order to eliminate competition between them.

THE "RULE OF REASON." In disbanding two great combinations in 1911, the Supreme Court laid down the "rule of reason," a rule which occasioned considerable comment and criticism. It will be recalled that the Sherman Act forbade *every* contract in restraint of interstate trade. The Court's rule of reason was that Congress had not intended to forbid every such contract, but had simply meant to embody in statute form the common law, which recognized as illegal only those contracts that "unreasonably" restrained trade. In arriving at this decision the Court may have taken some liberties with the statute. Indeed, one member, Justice Harlan, in a vigorous dissenting opinion declared that the Court had usurped the powers of Congress and legislated this meaning into the law. At any rate, the decision made a sweeping classification of business combinations into two groups: those reasonable and within the law; and those unreasonable and without the law.

The Clayton Act (1914). But just what contracts were "unreasonable"? Many business men felt, with some justification, that the law itself was unreasonable in that it did not name in clear terms the practices which would subject them to its penalties. This uncertainty as to the application of the law, combined with the constant growth of business combinations since its enactment, clearly indicated a need for additional and more specific legislation. In his campaign for the presidency Wilson had said a great deal about trusts, and his first Congress passed the Clayton Antitrust Law (1914). More specific than the Sherman Act, it prohibits, among other objectionable practices, discriminating charges to purchasers of identical articles, a practice which is clearly in restraint of trade. Also prohibited is the practice of making a reduction in price to one purchaser on condition that he makes no purchases from a competing firm, where the agreement is of such a nature as to reduce competition materially or tend to establish a monopoly. The act also contains various provisions designed to prevent interlocking arrangements among large banks operating under the laws of the United States, manufacturing concerns, and common carriers. Another important provision of the act enables an individual to secure an injunction against firms following prohibited practices, a form of legal action which could be taken only by the government under the Sherman Act. The Clayton Act was also designed to restrict the use of injunctions in labor disputes, a purpose which, as the next chapter will show, was not fully accomplished.

The Federal Trade Commission. The antitrust measures thus far discussed are enforced by appropriate arms of the federal government—

the provisions respecting banks by the Federal Reserve Board, those applying to common carriers by the Interstate Commerce Commission, and those applying to commerce in general by the Federal Trade Commission, the courts having a final word to say in cases duly before them. The chief agency for administering the antitrust laws is the Trade Commission, created in 1914. It is composed of five members, appointed by the President with the consent of the Senate for terms of seven years. On the staff of the Commission are administrative officers, attorneys, economists, accountants, and clerks, bringing the total number to about 550. The duties of the Commission may be divided into two main classes—law enforcement, and research and investigation.

1. LAW ENFORCEMENT. The Commission administers the Federal Trade Commission Act, a section of the Clayton Act, and some more recent acts including the Robinson-Patman Antidiscrimination Act (1936) and the Wool Products Labeling Act (1939). The act creating the Commission makes the general declaration that unfair methods of competition in commerce are unlawful, and leaves the Commission to decide just what methods of competition are unfair. From time to time it has branded various practices as unfair, until the accumulated list occupies seven pages in its annual report for 1942. Specific practices thus forbidden include the use of false or misleading advertising; procuring the business secrets of competitors by bribing their employees, or by similar means; using merchandising schemes based on lot or chance; the use of the "free" goods device to create an impression that something is being given away when its price is actually included in the amount paid for other articles; and securing business by a pretended "free trial" offer, when only a "money back" opportunity is really offered.

A practice may be investigated by the Commission upon its own initiative or, more commonly, upon complaint of a party that a particular practice of some concern is unfair. Thus, in 1942, the Commission investigated the case of a firm which represented its face powder and creams to be germicidal by reason of their vitamin content, and the case of a company engaged in the sale of tennis, badminton and squash rackets, imported in an unfinished state from Japan, which importation was concealed by obliterating the legend "made in Japan."³²

The Commission always gives the party against whom complaint is made a copy of the complaint. The next step is the hearing at which all parties are fully represented. If the Commission finds the practice complained of unfair, it issues a "cease and desist" order. In 1942 such orders were issued in the two cases mentioned above and in 248 other cases. It may happen that the original notice of a complaint is sufficient to stop an unfair practice. But ordinarily a party complained of will make a de-

³² *Annual Report of the Federal Trade Commission*, (1942), p. 42.

fense before the Commission. When ordered to cease and desist, a party not infrequently contests the Commission's order in the federal courts.

The prevention of unfair practices is sought not only through these prohibitory orders of the Commission, but also through co-operation of the Commission with various lines of business. The Commission sponsors trade-practice conferences, in which those engaged in a particular industry may arrive at an agreement as to what constitutes unfair practice within the industry and have such agreement approved by the Commission. This work of the Commission had some influence with the business Code makers in N.R.A. days.

2. **RESEARCH AND INVESTIGATION.** Another important group of powers belonging to the Commission, and not entirely dissociated from those of law enforcement, are those relating to research and investigations. Upon its own initiative, or upon application of the Attorney General, the Commission investigates the manner in which corporations are carrying out court decrees issued against them under the antitrust laws. Under the direction of the President or either House of Congress, it must investigate and report alleged violations of the antitrust acts; and at the request of the Attorney General, it must "investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust acts." The Commission is authorized to investigate from time to time the conditions of foreign trade and to make such recommendations to Congress thereon as it deems advisable. It is further authorized to gather information concerning the organization, business, conduct, practices, and management of any corporation engaged in commerce (excepting banks and common carriers), and its relation to other corporations and individuals. Under its power of investigation and research, the Commission has made numerous studies of the highest value, useful not only in an academic sense but of very immediate service to Congress in the preparation of needed legislation. Some of the more recent research activities of the Commission include investigations of the power and gas utilities and chain stores. During 1942 it conducted 16 investigations, all related to projects in furtherance of the war program.

Recent fair-practices legislation. Under the National Industrial Recovery Act of 1933, the antitrust laws were practically suspended. When the N.I.R.A. was declared unconstitutional, the antitrust laws were restored, and congressional interest in their revival was manifested in the Robinson-Patman Act of 1936. That legislation amended the Clayton Act and restated in more inclusive form the basic principle prohibiting price discriminations. It forbids the seller of a commodity to discriminate in price between different purchasers "where the effect of such discrimination may be substantially to lessen competition or tend to create a

monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The Federal Trade Commission has been actively enforcing the somewhat complicated provisions of this act, hearing scores of complaints under it each year and issuing "cease and desist" orders in cases where it is violated.

The Wheeler-Lea Act of 1938 is incorporated into the Federal Trade Commission Act and broadens that act in several particulars. As earlier legislation prohibits unfair methods of competition, so the Wheeler-Lea amendment prohibits unfair or deceptive acts or practices in commerce. The dissemination of false advertising of foods, drugs, devices (for use in the diagnosis, prevention, or treatment of disease), or cosmetics is made unlawful, and criminal penalties are prescribed for advertising relative to any such commodity, the use of which may be injurious to health, or where there is intent to defraud or mislead. To June 30, 1942, the Commission had investigated 1,644 formal complaints alleging unfair and deceptive acts and practices through false advertising.³³ Orders to "cease and desist" were issued in many of these cases.

The Commission may proceed in a United States district court by injunction to prevent the dissemination of matter prohibited, pending the final disposition of a complaint under the law. One such order enjoined an urban drug chain from advertising the efficacy of a weight-reducing compound while neglecting to suggest that some stout people might prefer obesity and good eyesight to slimness and blindness, the latter being a possible effect of the compound.³⁴ If one has doubts of the value of the work of the Commission, or of the cupidity and rapacity of a segment of the human race, let him thumb through the list of the practices attempted by promoters and prohibited by the Commission.

One other act which is enforced by the Commission is the Wool Products Labeling Act of 1939 (effective 1941). Wool products coming under the act must be labeled to reveal their fiber content and to show the percentage of wool, reprocessed wool, reused wool, and other fiber contained in the product. Here again the Commission may issue its "cease and desist" orders and, in appropriate cases, it may apply to the courts for an injunction against violators and for condemnation of misbranded merchandise.

Regulation a continuous problem. It may be said that by far the greater part of the antitrust and fair trade legislation has been aimed in the right direction. It would be a great mistake, however, to assume that the field has been adequately covered. Business combinations and concentrations are actually on the increase, and many are the arrange-

³³ *Ibid.*, p. 32.

³⁴ *Ibid.*, 1939, p. 111.

ments in restraint of trade which the law does not cover. The war emergency serves as a decided stimulus for such combinations because the need for supplies is so urgent that manufacturers must be left a wide range of discretion as to business arrangements. War has never been a time for insistence upon meticulous observation of customary restraints, and if the restraints are those which in normal times are accepted only grudgingly and of necessity we may be assured that they will rest lightly upon the wartime conscience. Not only that, but governments usually find it necessary to suspend the operation of some of the antitrust laws in such times.

Even before the United States entered the present war, there was a marked trend toward business concentration. The President (1938) called attention to this fact and Congress set up the Temporary National Economic Committee, composed of a few members of each House and some high administrative officials. The Committee took its assignment seriously, hearing hundreds of witnesses and studying numerous reports, but its members were divided in their recommendations, as men usually are when they consider large problems. But there is no doubt that the end of the war will call for new antitrust legislation and so will the succeeding years. After legislation comes the problem of enforcement, which is extremely difficult because such laws are full of complications, because some business organizations strenuously oppose their application, and because there are some public officials, including a few judges, who look with disfavor upon any effective regulation of business. Of one thing there is abundant assurance—the problem of regulation will remain.

C. Federal Aids to Business ³⁵

From what has already been stated, it is clear that the federal government has encouraged and promoted business as well as regulated it. Promotion came first, then restrictive regulation combined with promotion, and finally came enlightened regulation and promotion in close cooperation with business. Government encouragement and support for business is particularly outstanding in the domains of foreign commerce, railroad transportation, and aviation, already reviewed. The same cooperative principle is apparent in the work of the Federal Trade Commission, which, while enforcing the restrictive antitrust laws, is, as we have already learned, nevertheless empowered to work in harmony with business and to encourage it in every way possible. Business, of course, receives invaluable support through the maintenance of a stable currency

³⁵ *Annual Reports of the Department of Commerce*; C. A. and Wm. Beard, "The Public Be Served," *Scribner's Magazine*, April, 1933, and by the same authors, *The American Leviathan*, Ch. XIV; E. L. Graham, and F. W. Harris, *Patents, Trademarks, and Copyrights* (1921); J. A. Dienger, *The United States Patent System* (1941).

system, the regulation of banking, and the far-flung operations of the Post Office Department. Indeed, practically every function the government performs serves business in one way or another. A few of these aids not already discussed may be briefly considered.

1. **Domestic marketing service.** In addition to the important work of promoting foreign commerce noted in the first part of this chapter, the Department of Commerce is actively engaged in several ways in assisting business in general. It makes studies of the national income; collects, tabulates, analyzes, and releases to the public various data widely used by business firms, government officials, and others whose interests and duties call for an understanding of business conditions; co-operates with university schools of business administration and departments of economics; gathers information and makes reports on such matters as operating conditions in the wholesale grocery trade and accounting methods for small retailers; and publishes *Domestic Commerce*, a weekly bulletin, the *Survey of Current Business* (monthly), and, from time to time, special reports. Only one other activity will be mentioned, the commendable one of using its influence and good offices to remove the trade barriers between the states.³⁶

2. **Commercial standards.** A set of standards being indispensable for business practice, the Constitution gives Congress the power "to fix the standard of weights and measures." Congress has legalized two standards—the somewhat cumbersome English system with which everyone is familiar, and the simple metric system which the student uses in laboratories and occasionally sees employed in industry. The original units of weights and measures are kept by the Bureau of Standards in the Department of Commerce. From this Bureau the states may procure copies of the standards for use in testing local weights and measures. To the Bureau public agencies and private individuals may send instruments and materials, and, for small fees, have them tested by federal standards. Electric batteries, weights and balances, airplane engines, pottery and chinaware, fusible boiler plugs, rubber, clinical thermometers, and a host of other things are tested annually.

FEDERAL SPECIFICATIONS. As a part of this standardization process, the national government has developed through the Federal Specifications Division a system of tests for various materials regularly purchased by that government. Hundreds of purchase specifications have now been promulgated. The states, learning by experience that they can trust the scientists who prepare the federal specifications, have come to insist that materials sold to them shall conform to those specifications. The public is also aware of these "master specifications," and manufacturers are beginning to advertise that their products are prepared according to such specifications. Thus good service is performed by the national

³⁶ On interstate trade barriers see Ch. 3, sec. I.

government for itself, other government units, producers, and consumers. Everyone should be happy. In addition to the type of specification which originated in connection with government purchases, the Bureau of Standards now encourages trades, whether they sell to the government or not, to agree upon standards in their respective lines of production. When a sufficient percentage of those engaged in a particular business agree upon a set of rules, they are published by the government as "commercial standards" for that business. About fifteen thousand firms have requested to be listed "willing to certify" that their abrasives, insecticides, padlocks, soaps, towels, and what not, conform either to the federal specifications or the commercial standards.

SIMPLIFIED PRACTICE RECOMMENDATIONS. Henry Ford is reported to have said some years ago that the buyer could have a car of any color he desired as long as it was black. He wanted to make as many cars as possible as cheaply as possible, and this program had no place for variety. Manufacturers of articles designed to be ornamental as well as useful must heed the call for varieties; but those who make things designed primarily to stand wear and tear should limit sizes and styles to a minimum. Realizing the great economic waste which comes from manufacturers' overindulgence in the matter of varieties, the Bureau of Standards has assumed the task of assisting producers in reaching agreements to reduce the number to actual requirements. From time to time the Bureau brings together manufacturers of a particular class of articles, and it is often successful in securing a "simplified practice recommendation." Nearly two hundred have been secured in the few years this service has been in operation. Numerous and unnecessary varieties in size and style have been eliminated at great saving to manufacturers and consumers. Although the fact that simplified practices have been adopted for such earthy matters as wrapping and packing supplies, the size of milk bottles, and the width of beds may not interest the reader, it indicates the practical nature of the service rendered by the Bureau. Incidentally, the grim necessities of these times are teaching a few lessons in simplified practices.

3. Protecting inventors and authors. Under its authority to "promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" Congress has enacted a code of patent and copyright laws.

(a) **PATENTS.** The patent laws are administered by the Patent Office in the Department of Commerce.³⁷ When an inventor pays a fee and satisfies the examiners of patents that he has something different and useful—a mechanism, a design, or even a growing plant—he receives a patent which entitles him to exclusive rights in his product for a period of seventeen years. He may even secure privileges in foreign countries by hav-

³⁷ To avoid the congestion of Washington, a number of the activities of the Patent Office are now carried on in Richmond, Va.

ing his patent registered in those countries with which the United States has patent agreements. The holder of a new patent may meet with difficulties, however; for the grant of a patent does not protect him from suits brought by competitors who claim that their patents have been infringed. Very fine distinctions must be made in patent litigation, and some of the best legal talent in the country is engaged in this practice. The number of patents issued annually by the United States averages around 50,000 and the total issued is approximately 2,300,000—about the number granted by all other countries combined.

(b) **TRADE-MARKS.** In addition to granting patents, the Patent Office registers trade-marks. The federal government has no specific grant of authority to perform this service; but under the commerce clause, Congress has provided for the registration of trade-marks which are employed in interstate and foreign commerce. Since large business is seldom confined within the boundaries of any state, the registration privilege has considerable value. Before a trade-mark is registered, the Patent Office checks over prior registrations to make sure that existing rights will not be infringed. A registration is good for twenty years, and renewal is granted without limit. The owner of a registered trade-mark may use it or sell it as he sees fit. If his rights are infringed by a competitor, the courts afford him ample remedies. In order to give trade-marks international protection, the United States and several other powers have an agreement whereby the citizens of any one of these countries may register their trade-marks with an international bureau and thus receive the same protection against infringements in the other countries as in their own.

(c) **COPYRIGHTS.** A division of the Library of Congress is charged with the duty of issuing copyrights for books, cartoons, charts, maps, labels, prints, musical compositions, and similar productions. A copyright is granted to anyone who makes the request. Unlike the procedure in granting patents and registering trade-marks, the Register of Copyrights makes no search to determine whether the desired copyright infringes upon other such rights previously granted. If there is any infringement, the injured party must go to the federal courts for relief. The owner of the copyright has exclusive privileges with respect to his production for a period of twenty-eight years, and his rights may be renewed for a like period.

For a long time the holders of copyrights had no protection from their infringement in foreign countries. American publishers "pirated" English works; that is, reproduced them on this side without the consent of either the authors or their publishers and without paying royalties. Dickens and his publishers were special victims of this unethical practice. English publishers often displayed a similar lack of restraint and reproduced American publications. Finally, by appropriate laws and treaties, the United States secured protection for American copyrights abroad by granting to foreign authors and publishers, similar protection against

infringement in the United States. There is one proviso, however, and this is that books in the English language must be printed in the United States in order to get the benefit of our copyright laws.

Bankruptcy laws. Although the national government and the states have concurrent powers to make bankruptcy laws, the legislation of the former is so extensive that the states are practically driven out of the field. Under the national laws an individual or corporation, excepting banks, railroads, insurance companies, and municipal corporations, may voluntarily institute bankruptcy proceedings. In like manner involuntary proceedings may be instituted against persons or corporations, with the exceptions named above and with the additional exception of farmers and laborers. In either case the purpose is to distribute the bankrupt's assets among the creditors and secure a discharge from further obligations to them. The bankruptcy laws are administered very largely by referees in bankruptcy, men who are appointed by federal district judges and who are responsible to the judges. Some rather ugly scandals and near scandals, not entirely dissociated from the judicial office, have attended the administration of the bankruptcy laws.

The business depression led to liberal amendments to the bankruptcy laws. Persons whose assets may still be greater than their liabilities but who cannot meet their obligations as they fall due may, as "debtors" rather than as bankrupts, arrange settlements with their creditors. Corporations were authorized to readjust their obligations with the approval of their creditors and under court supervision. Railroads came in for special consideration, and the farm mortgage moratoria laws, the first of which was declared unconstitutional, served as additional proof of the intention of Congress to give the farmer an "even break."

D. Emergency Measures in the Aid of Business and Labor ³⁸

The discussion in the preceding paragraphs perhaps conveys some idea of what the federal government does for commerce and business in normal times. In periods of business depression, the government is called upon to increase and broaden its activities. The crisis which originated in 1929, by midsummer of 1932 had extended to such proportions that business was only about 50 per cent normal and at least 10,000,000 persons were unemployed. First, the local governments were told that the task of taking care of the unemployed was their problem, and nearly all of the cities and counties made serious attempts to solve it. Later, a number of states were under the necessity of coming to the aid of their local

³⁸ Current literature in the "recovery" period (1933-1937) contained much on this subject. See especially *The United States News*, H. L. Ickes, *Back to Work: The Story of P.W.A* (1935); D. Lawrence, *Beyond the New Deal* (1934); and G. H. E. Smith and C. A. Beard, *The Recovery Program* (1935).

subdivisions, although the authorities in some states remained aloof, doggedly insisting that relief was a local problem. Far from being a local problem, it was, of course, national in scope.

What action did the national government take? In the early stages of the crisis the President held various conferences with business men, hoping thereby to restore confidence and to prevent any serious depression. Information, suggestions, advice, and entreaties were freely exchanged. Despite these informal conferences, usually followed by optimistic statements, the crisis spread. More wages were cut; more men were laid off; more factories closed. Banks failed in increasing numbers, and bankruptcies in general business became almost an epidemic. In the winter of 1931-32 the President sent a number of special messages to Congress, urging the immediate enactment of relief legislation. The response of Congress was heartening. By an overwhelming, nonpartisan vote it passed an act creating the Reconstruction Finance Corporation to be conducted by seven directors with wide discretionary powers. The excellent record of this Corporation in making its billions available in loans to banks, trust companies, building and loan associations, insurance companies, agricultural and farmers' associations, railroads, and other bona fide financial institutions was discussed in the section on the currency and banking in Chapter 21.

Reconstruction projects. It is not possible to say exactly how much the New Deal spent in quest of recovery, but twenty billions will do for an estimate. Of this amount, perhaps five billions has gone where it does not show—for direct relief, farm relief, and to certain credit agencies of the government. But other billions may be said to have gone into permanent improvements. Despite the starting up and disbanding of New Deal agencies, their overlapping on work projects, and the quick starts and sudden endings of some of the projects, there are achievements to be recorded. Roads have been scraped and flattened and widened into concrete ribbons; trees have been planted; ditches have been dug; swamps have been drained. Dams have been wedged in rivers; sewer and garbage treatment plants have been installed (Chicago's represents an outlay of \$100,600); housing projects have been undertaken, of which Cleveland's \$11,700,000 project is a good example; aqueducts have been constructed, the one for Los Angeles costing \$220,000,000. Then, there is the Mississippi River control, the All American Canal, the Manhattan traffic channels, all projects which seem likely to justify themselves. There is hardly room for doubt that much of this New Deal spending has gone into projects for the permanent improvement of the country.³⁹

Help for home owners. A number of credit agencies designed primarily for home owners were established in 1932-1934. Federal home loan banks, one in each federal reserve district, were set up (1932) to

³⁹ *Fortune*, November, 1936, pp. 76 ff.

make it possible for building and loan associations and other institutions holding home mortgages to make new loans and continue old ones on more favorable terms. Building and loan associations may take their long-term home mortgages to home loan banks and borrow on them somewhat as a member bank takes its notes to a federal reserve bank for rediscounting, and for the same purpose, namely, that it may have more money to lend. In 1933 Congress created The Home Owners' Loan Corporation and authorized it to give bonds, guaranteed by the government, to holders of home mortgages. The corporation then dealt with the home owner on more lenient terms than the original mortgage holder was able or willing to adopt. With the passing of the emergency, this corporation practically ceased its lending functions.

Under the National Housing Act (1934) it is possible for a home owner to borrow money from a local financial institution for the purpose of improving his home. The loan is partially insured by the government. In like manner, one may borrow for the building of a home on a long-term mortgage plan. Such loans, if approved, may be guaranteed in full under the Housing Act. This measure has the obvious purposes of stimulating building construction, and home owning and improvement. It has the less obvious purposes of lowering the cost of interest rates on home mortgages and making available additional investments for banks and other lending institutions. Like many another venture of the New Deal, it is one which only the most socially minded thought of a decade ago, but there seems to be little objection to its purposes. Although enacted during the emergency and with the hope that it would be a factor in restoring normal conditions, the National Housing Act is understood to be a permanent piece of legislation. The National Housing Administration is now occupied, almost to the exclusion of its other activities, with the promotion of housing in defense areas.

The National Recovery Administration. The legislation from which the President expected the most in the way of national economic restoration was the National Industrial Recovery Act. This revolutionary (for the United States) legislation declared that an emergency existed in industry and announced the policy of Congress (actually of the President) to be "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of co-operative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices . . . , to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." It was hoped that the commerce power under which Congress enacted this legislation would be broad enough to support its constitutionality, but

some members of that body and many people outside of it had their doubts. The act itself did not contain many specific provisions, the plan being to leave the widest possible discretion in the hands of the President.

The National Recovery Administration was organized to administer the act and General Hugh S. Johnson, whose name became almost immediately synonymous with the N.R.A., took the herculean task of Administrator. A code of fair competition was to be adopted by the representatives of each industry and submitted to the President for his approval. Each code was supposed to contain provisions which would protect small industries, prevent monopolies, protect consumers, and preserve the essential rights of labor such as union membership and collective bargaining. Hours of labor were to be shortened and child labor was to be abolished. While the specific code was being made for each industry a "blanket code" was generally accepted by industry and business. The Blue Eagle made its appearance everywhere, in store windows, on windshields, on letterheads, and in the windows of millions of homes. The making of the specific codes proceeded under some difficulties, but in the course of twelve months hundreds of them had been adopted.

The abolishment of child labor and the shortening of the hours of labor did result in some re-employment, but prices started to rise and the early progress in the restoration of employment failed to continue. There was much complaint against the N.R.A. by small-business men, who said they were being squeezed out by larger concerns. It was inevitable that this measure should come before the Supreme Court for a test of its constitutionality. In the spring of 1935 the testing time came. The Schechter Poultry Corporation was prosecuted for selling an "unfit chicken" and other violations of the "live poultry code." In reviewing the case, the Supreme Court picked the Blue Eagle, unanimously removing every pinfeather. The statute was held bad because it regulated business which was not in interstate commerce and which affected that commerce only indirectly, and because it delegated legislative powers, practically without restriction, to the President.⁴⁰ Following this decision, Congress enacted the Guffey Act, designed to stabilize the soft coal industry and protect the rights of labor employed therein. This act was declared void by essentially the same reasoning as that used in the Schechter case.⁴¹

Nevertheless, the years immediately following recorded some distinct gains in the acceptance of this type of legislation. No longer does the Supreme Court void acts of Congress because they deal with subjects and transactions only *indirectly* affecting interstate commerce. As pointed out in the second page of this chapter, all that now appears to be necessary to bring a matter under the commerce clause and, therefore, under

⁴⁰ Schechter v. United States, 295 U.S. 495 (1935).

⁴¹ Carter v. Carter Coal Co., 298 U.S. 238 (1936).

the legislative authority of Congress is that it have *some* relation to interstate commerce. The newer legislation which has been sustained relates primarily to labor, and it is reserved for discussion in the next chapter.

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Government and Labor



Until a generation or so ago, labor was supposed to take care of itself. When such a large part of the population made its living from the soil and when industry was confined to small establishments, labor usually managed in one way or another to keep its head above water. A large percentage of workers were their own masters on farms and in small shops. The farmer could eat regardless of hard times, and many of those who had left the farm in prosperous years could retrace their steps when the wheels of commerce slowed down. In those days governments concerned themselves little with conditions of employment, hours of labor, wages, or similar matters. Although a few people still cling to the idea that "individualism" and the "dignity of labor" demand that governments pursue a "noninterference" policy, the high percentage of industrial workers, the hazards of industrial employment, the concentration of workers in large cities, and other factors have made such a policy impossible. Both the federal government and the states have found it necessary to enact a number of labor laws. First we shall see what the federal government has done; then we shall turn to the states.

I. NATIONAL LABOR LEGISLATION ¹

A careful reading of the Constitution does not reveal that the national government has any control over labor, that power seemingly having been reserved to the states or to the people. But through its authority to regulate interstate and foreign commerce and to appropriate money for various purposes not listed in the Constitution, Congress exercises a rather wide range of powers to do good or ill for labor. Then, too, as we learned in Chapter 20, the national government is the largest employer of labor in the country, and its treatment of its own employees naturally has a very wide influence.

Immigration laws favorable to labor. The federal government's im-

¹ C. A. and Wm. Beard, *The American Leviathan*, (1930), Ch. XV; Herman Feldman, Ed., "Labor Relations and the War," *Annals of the Am. Acad. of Pol. and Soc. Sci.*, CCXXIV (November, 1942); D. P. Locklin, *Railroad Regulation Since 1920* (1928), Ch. IX; L. G. Reynolds and others, *Labor and National Defense* (1941); G. S. Watkins and P. A. Dodd, *Labor Problems* (1940 ed.); M. Wood, *Labor, Industry, and Government* (1935); *Annual Reports of the Secretary of Labor*.

migration policy has been shaped very largely to meet the demands of organized labor that the American worker be protected from competition with cheaper immigrant labor and from unemployment. The successive changes in this policy, which was originally one of welcome to all comers and at present places immigrants on a severely restricted quota basis, were sketched in Chapter 6, sec. II.

Protection of seamen. Through its power over foreign and interstate commerce, the national government is in a position to do a great deal for seamen and for railway employees engaged in the processes of interstate commerce. First, what has been done for seamen? Men employed on our merchant ships in earlier times were subject to rather rough treatment. Less than a century ago, the Boston Marine Society petitioned the government to restore the right to flog sailors to their work. Exemption from flogging seems to have been one of the few privileges which seamen enjoyed at that time. Long after Negro slavery was abolished, the Supreme Court of the United States held that a seaman who broke his contract could be imprisoned for desertion, although such imprisonment was held to be contrary to the Thirteenth Amendment when imposed for the breaking of ordinary labor contracts.² Now seamen have what appear to be quite adequate legal safeguards.

The La Follette Seamen's Act became a law (1915) largely through the insistence of the Seamen's Union strongly backed by the American Federation of Labor. The seaman's diet must include specified quantities of water, rice, beans, pickles, bread, salt pork, potatoes, coffee, tea, sugar, and so on. Clothing, tobacco, and blankets must be kept in the "slop chest" and sold to the crew at not more than a 10 per cent increase over the wholesale prices. Seamen must be furnished with safe and warm quarters. Their wages must be paid in legal tender, regularly, and part payment must be made in every port. The hours of labor are prescribed, and the crews are not to be required to do unnecessary work on Sundays and holidays. Furthermore, the act provides that all vessels shall have in their crews a high percentage of able seamen—a concession to the demands of skilled labor and a safety precaution as well. But the greatest triumph for seamen is found in the provision that a strike on the high seas shall no longer be designated as mutiny, nor the breaking of a seamen's contract as desertion. By an act of 1920 the essential provisions of the Employers' Liability Act, to be presently explained, were extended to seamen.

Protection of railway employees. A few of the acts passed for the safety of passengers and train crews were discussed under "railroads" in the last chapter. At this point, brief attention is to be given to some of those laws which have been enacted primarily for the benefit of rail-

² See Ch. 5, sec. II.

road laborers and their employers, although public interest and convenience are by no means absent from them.

1. **HOURS OF LABOR.** The Hours of Service Act of 1907, limiting the employment of persons engaged in the movement of trains to sixteen consecutive hours, was a safety measure designed to reduce accidents caused by the fatigue of overworked employees. It is a rather far cry from this act to the Adamson Act of 1916, which established the eight-hour day for trainmen employed on interstate railways. It is true, of course, that the act had some relation to safety; but the main purpose was to limit the working day to hours advocated by the labor unions. Indeed, the bill became a law through the threat of a nation-wide strike of railway employees. The passage of the bill was a great victory for organized labor and the occasion of a very loud public protest; but its constitutionality was sustained by the Supreme Court, despite the fact that in those days the Court was putting a strict construction upon the powers of Congress under the commerce clause.

2. **EMPLOYERS' LIABILITY.** For a long time, employees on interstate trains and other employees under a federal jurisdiction could not recover damages for injuries received in the course of employment except under the old common-law rules, which were entirely inadequate to meet the needs of an industrial civilization. For example, if a laborer was injured through the negligence of a "fellow servant," his employer was not liable. Again, the employer escaped liability if a laborer's injury was caused in part by his own "contributory negligence." Another rule which stood in the way of his claim for damages was that of "assumption of risks," which in everyday language meant that a workman assumed all the ordinary hazards of his employment. The Second Employers' Liability Act (1908)³ abrogated the first of these rules and greatly modified the second and third. It applies to all employees actually engaged in interstate commerce. The company no longer escapes liability by attaching the blame to a "fellow servant." If the accident is due in part to the "contributory negligence" of the injured employee, the company is liable for that portion of the damages not chargeable to such neglect. As for the "assumption of risks," the company may no longer make that defense unless it can prove that the injury occurred despite the fact that the company was observing all provisions of law designed to prevent it. The act also provides that relatives may recover damages when railway employees are killed—elementary justice achieved by the abrogation of the common-law rule that one person should not be awarded damages for the wrongful death of another. As noted above, the essential

³ The First Employers' Liability Act was declared void because its provisions extended to all employees of interstate carriers whether or not such employees were actually engaged in interstate commerce functions.

features of railway carriers' liability now apply in the merchant marine service. Still more in accord with legislation in progressive states than the act just discussed is an act passed in 1927 for the benefit of longshoremen and harbor workers.

3. **SETTLEMENT OF RAILWAY LABOR DISPUTES.** In the interest of employers, employees, and the public, it is highly desirable that labor disputes be adjusted with a minimum of friction. The first effective act to this end was passed in 1898. Under the system of mediation and arbitration which it provided, a number of labor troubles were satisfactorily settled. The system was strengthened by a later act; but it broke down in 1916 when the railroad brotherhoods refused to submit to arbitration. During the war period of 1917-1918, when the government operated the railroads, it set up a Railway Wage Board and various boards of adjustment. These functioned smoothly, owing to the liberal attitude of the government, the temporary employer. With the return of the railroads to their owners, the machinery for settling disputes was necessarily changed.

The Transportation Act of 1920 established a Railroad Labor Board and authorized, but did not require, the establishment of railroad boards of labor adjustment. Few of the latter were ever set up, and most of the work of adjustment was left to the Labor Board. This Board, composed of three representatives each of employers, employees, and the public, was given jurisdiction in various types of labor disputes, including wage disputes. Its decisions were not always observed, and it was frequently charged with partiality to the employers. The Railway Labor Act of 1926 abolished this Board and placed great emphasis upon conferences between employers and employees for the settlement of disputes. If conferences fail, it is provided that mediation shall be undertaken. Should mediation fail, arbitration is prescribed. Finally, if arbitration fails, the President may appoint an emergency board to deal with the situation.⁴ This act, as amended in 1934, has given the railroads pacific labor relations which make those carriers the envy of other great industries.

4. **RAILWAY WORKERS RETIREMENT SYSTEM.** In 1934 Congress passed the Railway Pensions Act. That act required contributions from the railroads and the employees for the purpose of establishing a pension fund for the latter. But the next year the Supreme Court, in a five to four decision, declared that the establishment of a retirement system for railroad workers was "in no proper sense a regulation of the activity of interstate transportation."⁵ Congress followed this decision with the Railroad Retirement Act and the Carriers Taxing Act (1937). Inasmuch as these acts were prepared after close consultation with railroad officials and employees, it is understood that their constitutionality will not be attacked.

Protection of employees feeding interstate commerce. Formerly, na-

⁴ Locklin, *op. cit.*, p. 146.

⁵ *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935).

tional labor legislation was designed almost exclusively for labor actually engaged in interstate commerce; but the New Deal Administration gave the commerce clause a much broader interpretation, and pushed through legislation in the interest of labor which was employed in mining, manufacturing, or other enterprises not engaged in interstate commerce, but the products of which entered that commerce.

The N.R.A. extended a friendly hand to labor in various ways. Child labor in industry was prohibited. Section 7a, around which there was so much controversy, gave labor the right to organize and bargain collectively through representatives of their own choosing. Many employers encouraged the formation of "company unions," a practice which a few of them had followed for some time. The employers could deal with these organizations much more advantageously than with the powerful trade unions. By executive order the President created the National Labor Board in 1933 and supplanted it with the National Labor Relations Board the next year. These and other labor boards found that union recognition was the most vital labor question and the one which was submitted to them most frequently. Conducting elections in which employers' unions and the regular unions were competing for collective bargaining representatives gave the labor boards some severe tests and involved them in some law suits. Of course the Supreme Court's decision against *N.R.A.* in May, 1935, ended employer-employee relationships under that organization. The Guffey Coal Act, passed after the *N.R.A.* decision, gave labor essentially the old *N.R.A.* rights in the soft coal industry, but the Supreme Court held it invalid on grounds similar to those on which *N.R.A.* fell.⁶

The National Labor Relations (Wagner-Connelly) Act was passed in June, 1935, in response to labor's demands for something to take the place of section 7a under the now defunct *N.R.A.* The new act renewed the guaranty of collective bargaining and made a new advance in its provision that specifically forbids interference by an employer in the organization of his employees. The Wagner-Connelly Act sets up a National Labor Relations Board which is charged with the duties of enforcing the rights of labor. It is not limited in its application to business clearly of interstate commerce character, but brings within its scope business which affects interstate commerce. On April 12, 1937, the Supreme Court in a far-reaching five-four decision sustained its constitutionality. Said the Chief Justice, speaking for the majority of the Court: "Although activities [of an industry] may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . When industries organize themselves on a national scale making their relation to interstate commerce the dominant

⁶ See Ch. 22, sec. III, subsec. D.

factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"⁷ This decision is significant not only because it upholds the rights of labor but also because it makes what may be an historic reinterpretation of the power of Congress to legislate under the commerce clause of the Constitution. It suggests Chief Justice Marshall's interpretation of that clause in the case of *Gibbons v. Ogden*.

The National Labor Relations Act and the board which administers it have been severely criticized. Employers include in their charges against the legislation its failure to make trade unions "responsible" through compulsory incorporation and to list "unfair practices" by labor unions such as coercion to join unions and the sit-down strike.⁸ Employees say also that the Board is unfair to them, and the A.F. of L. has fired some heavy bolts at the Board for alleged partiality to the C.I.O. A large segment of the public seems to have accepted the view that the Wagner Act gives too much to labor and exacts too little in return and that it stimulates rather than retards industrial conflicts. Such criticisms of the act and its administration, combined no doubt with the desire in some quarters to limit the legitimate rights of labor, led the House of Representatives to authorize (1939) an investigation by a committee whose leading members were no friends of labor. This committee recommended a number of amendments to the law, some of which would have weakened it fundamentally. But the defenders of the original legislation, particularly Senator Wagner, while admitting that certain administrative defects should be corrected, ably defended it by showing that the Board had made a remarkably good record in adjusting cases without formal proceedings, in securing judicial vindication of its rulings against which appeals had been made, and in reducing, to some extent, the number of strikes. The law and the Board escaped execution and mutilation.

The Fair Labor Standards (Wage and Hour) Act of 1938 is a measure of some significance. It applies to employments in and affecting interstate commerce, but makes certain exception, the most important being farming and retail service trades. The law fixed normal hours at forty-four for the first year of its operation, but this was to be reduced to forty hours after October, 1941. Some exceptions to the hour maximum are permitted, for example, in the seasonal industries. Twenty-five cents an hour was fixed as the minimum wage for the first year, but this minimum must be increased to forty cents by October, 1945. Variation in the minimum wage is permitted in the different industries, but no minimum wage rate shall

⁷ *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937).

⁸ Selig Perlman, "The United States of America," in H. A. Marquand, and others, *Organized Labour in Four Continents* (1939), p. 387. For a complete study of the Labor Board, see D. O. Bowman, *Public Control of Labor Relations* (1942).

be fixed "solely on a regional basis," according to the statute. Yet substantially this basis is used when, for example, a lower rate is fixed for seamless hosiery workers, mostly Southern, than for full-fashioned hosiery workers, mostly Northern. In general employers do not quarrel with the "objectives" of this law, but they claim that in its administration there has been too much rigidity. In rush seasons they say pay-roll costs mount (time and a half must be paid for overtime) too high for profits to be made. Also they complain because maximum hour provisions apply to workers whose incomes are substantial. Farmers have raised a considerable outcry against the legislation. To be sure, farm labor is exempt from its provisions and so is the processor who first handles a farm product, but others who handle farm products are not exempt. Then, as might be expected, there has been difficulty in enforcing the law, difficulty due primarily to industrial opposition and insufficient staff in the enforcement agency, the wage-and-hour division of the Department of Labor. Dozens of bills to modify and amend the act have been introduced, but the Administration has successfully resisted them.

The Government Contracts (Walsh-Healey) Act is not based on the commerce power but rather on the authority of a government to prescribe conditions in its contracts. Passed in June, 1936, during the closing hours of the 74th Congress, this act may have a more far-reaching effect than any labor measure enacted in recent years. All persons and firms who get contracts from the national government in excess of \$10,000 must conform to labor standards very similar to those imposed by the old Recovery Act. The new act requires all such contractors to pay not less than the prevailing minimum wage in the locality in which the work is being done, which minimum is determined by the Secretary of Labor; it fixes the eight-hour day and the forty-hour week for labor employed by these contractors; it prohibits the employment of convict labor, male persons under sixteen, and female persons under eighteen; it prohibits the employment of labor on contracts in buildings or under working conditions which are unsanitary or hazardous or dangerous to health and safety; and it prescribes appropriate penalties for its violation. It is generally believed that the improvement in labor standards on government contract work will have a decided influence in improving labor standards generally.

Anti-injunction laws. The use of the injunction in labor disputes first came to be a burning issue in 1894, at the time of the Pullman strike in Chicago. For violating an injunction against interfering with the transmission of the mails or with interstate commerce, Eugene V. Debs, the leader of the strike, was cited for contempt of court, tried without jury (the usual proceeding against those who violate injunctions and the feature against which labor particularly rebels), and fined and imprisoned. The case made Debs famous and marked the beginning of organized labor's long fight against the injunction. But in the succeeding years, in-

junctions were sought and obtained with increasing frequency by organized capital against organized labor. Strikes were frequently broken by means of the injunction, and it seemed to labor and to many others that the courts were allied with capital against labor. In 1908 the Supreme Court held that labor boycotts were combinations in restraint of trade and were thus in violation of the Sherman Anti-Trust Act, an unexpected decision which further stimulated the efforts of labor for remedial legislation.

THE LABOR CLAUSES OF THE CLAYTON ACT. It was not until 1914 that labor found a friendly Congress and won what at the time appeared to be valuable concessions. The Clayton Act declared that "the labor of a human being is not a commodity or article of commerce"; that the anti-trust laws shall not be construed to forbid the existence of labor organizations or to forbid the members of such organizations from carrying out the legitimate objects thereof; and that labor organizations shall not be construed to be combinations or conspiracies in restraint of trade. The statute severely restricted the use of injunctions in industrial disputes, and prescribed the jury trial, if requested, for those cited for violating certain types of injunctions. Although proclaimed as the Magna Charta of labor, the charter practically vanished item by item as the federal tribunals passed upon its meaning. Thus, in 1922, Attorney General Daugherty obtained an injunction against striking railway employees, prohibiting them from using, among other things, threats, violent or abusive language, opprobrious epithets, jeers, taunts, entreaties, argument, persuasion, and reward in their attempt to induce the "scabs" to leave their jobs. The recital of activities from which the strikers should "absolutely desist and refrain" occupied several pages, and left them no ground upon which effective action could be taken. This and similar injunctions left labor with but a shadow of what the labor clauses in the Clayton Act seemed to give them. Strikes were frequently broken by injunctions charging labor with interstate conspiracies and monopolies. Labor agitators were still jailed without trial by jury for violating these injunctions. The "yellow dog" contract—an agreement of employment wherein the employee promises his employer that he will not join a trade union—spread in use and was upheld by the courts. In bitter disappointment, labor renewed its efforts to get legislative relief.

THE NORRIS-LA GUARDIA ACT. Finally, in 1932, many of the demands of labor were met in the Norris-LaGuardia Act. The "yellow dog" contract, as objectionable to labor as its cryptic title indicates, was banished into legal exile—declared to be unenforceable in the courts of the United States. Federal courts are forbidden to issue injunctions against workers for: striking; using union funds to aid the strike; furthering the strike by advertising, speaking, and picketing; holding mass meetings; and urging others to join the strike. Only two limitations are placed upon labor: in giving publicity to facts involved in a labor dispute, there must be no vio-

lence and no fraud. The employer may still get his injunction, if he can show that he has made "every reasonable effort" to settle the strike and if he shows that unlawful acts have been committed or threatened against him and that failure to enjoin the strikers will cause him "substantial and irreparable" injury. He is further required to deposit a bond to recompense the strikers in the event the court causes them damage by the erroneous issuance of a temporary injunction. Another provision of the bill gives the defendant the right of trial by jury in any contempt case growing out of a labor injunction.

It is significant that at the time of the passage of the Clayton Act a considerable proportion of the public was hostile to the demands of labor and that twenty years later a more comprehensive act met with general approval. It passed both Houses of Congress by overwhelming majorities, with only a few spokesmen of the industrial states issuing warnings about "making a long march toward Moscow." This change in attitude is to be observed in a number of states, where anti-injunction bills similar to the federal legislation have been enacted. Indeed, the Wisconsin legislature passed such a law a year before Congress placed the Norris-LaGuardia bill on the statute books.⁹

Employment service. Even in the prosperous years of the Coolidge era there were always hundreds of thousands of workers unemployed. In the spring of 1933, the number was commonly estimated at about 13,000,000, and it remained high until the war industries were in full operation (1943). How can jobs be found for these persons, nearly all of whom are eager to work? Work must be made available first and after that there must be some agency to assist the workers in finding it. Activities along the first line are indicated in the last section of Chapter 22. At this point we shall give brief mention to the employment services.

Such services have been operated by a number of states for years and by the national government since the First World War. But they have been rather feeble efforts in normal times and wholly inadequate to meet large scale unemployment. The state and federal agencies have usually failed to co-operate and in some cases they have actually been in rivalry. After about eight years of agitation in Congress and a pocket veto by President Hoover the important Wagner Bill finally became a law with President Roosevelt's approval in June, 1933. It is administered by a unit, the United States Employment Service, of the Federal Security Agency. It brings about close co-operation between state agencies and the federal agency through the allotment of federal funds to states which make an appropriation and meet the federal standard of efficiency.

Since an adequate program for the placement of workers must be both local and national in scope and since many workers out of employment must accept employment in lines other than those in which they have

⁹ E. E. Witte, "Labor's New Deal," *State Government*, April, 1933, pp. 3-5.

been engaged, the normal job of the Employment Service is perplexing and stupendous. Some aid to the Employment Service comes from the Bureau of Labor Statistics. The Bureau collects and distributes information on labor supply, hours, wages, cost of living, industrial accidents, and similar conditions affecting labor. It is extremely important in meeting any situation to know just what the situation is. For the period of the war emergency, the Employment Service has many places to fill and a shortage of prospective employees—the reverse of the problem of 1933–1940.

The protection of women and children in industry. Because of the nature of the employment in which they are commonly engaged and the division of powers between the state and national governments, the protection of women and children in industry until recently was left largely to the states. However, the national government has found power to cope with the problem since 1933.

1. **RESEARCH AND RECOMMENDATIONS.** The Children's Bureau, established in the Department of Labor in 1912, distributes its activities along a fairly wide front of investigation and research. It assembles material on such subjects as the children of the unemployed, maternal and child health, child labor, industrial home work (which often deprives children of the mother's care), children in industrialized agriculture, juvenile delinquency, and child welfare and social security. Specific research projects have included, among others, neonatal mortality and morbidity studies, maternal care in Hartford, Connecticut, rickets studies, studies of physical fitness of school children, and institutional treatment of delinquent children.

The Women's Bureau is also largely a research organization, making studies on technological changes in relation to women's employment, the potential earning power of southern mountaineer handicraft, pieceworkers and their production and earnings in the dress industry, state hour laws and minimum wage rates, part-time work in retail trade, and similar subjects relating to the employment of women. The studies of the Children's and Women's Bureaus are available for both public and private use. The federal government does not attempt to force, and has no power to force, state and local governments to accept the facts found or to follow the recommendations made by these bureaus; but the value of this work is attested to by the fact that states and cities often request the bureaus to undertake specific studies.

2. **ATTEMPTS AT POSITIVE REGULATION.** When the federal government attempts to regulate the employment of women and children by positive enactments, it is likely to meet with constitutional obstructions. Through its power over interstate commerce, Congress has enacted various laws respecting employees (principally male) of interstate common carriers. But in 1916, when the attempt was made to limit child labor in factories

by excluding the articles of such labor from interstate commerce, the Supreme Court held that this was a regulation of manufacturing, which is not commerce, under the guise of the commerce power.¹⁰ It was stated that the power to regulate commerce did not include the right to forbid commerce in particular commodities, unless such commodities were in themselves harmful; for example, lottery tickets and liquor. The Court was not impressed with the argument that there was an essential similarity in the injury done to children employed in manufacturing articles otherwise harmless and the injury done to the consumer of harmful articles. In the former case, the injury occurs before the articles have been placed in interstate commerce; in the latter, after transportation is completed—a point which impresses some laymen as being a distinction without a difference. The case was decided by a five-four division of the Court, and public opinion on the question was perhaps divided in reverse proportions. There is no doubt that the Court would now hold this act to be a valid use of the interstate commerce power.¹¹

But having been thwarted in its attempt to employ the commerce power in this way in 1916, Congress made another attempt to restrict child labor in the states. This time, (1919) it relied upon its power to tax. It levied a 10 per cent tax upon the net profits of all firms and establishments which knowingly employed children below certain specified ages in factories, mills, and similar industrial establishments. We have previously learned that this act was declared unconstitutional because it was more of a penal statute than a revenue measure.¹² Following its second failure to meet the judicial requirements of constitutionality, Congress proposed an amendment to the Constitution which would in clear terms give it the power to regulate child labor; but the amendment has not yet been ratified by the necessary three-fourths majority of the states.

What authority has Congress to enact labor laws for the protection of women and children in territory over which it has sole jurisdiction? The answer is, of course, that it is fundamentally the same as that which may be exercised in the states by state and congressional authority combined. But here again there are constitutional limits. For example, the "due process" clause of the Fifth Amendment may stand in the way, as it did when Congress enacted a minimum wage law for women and children in the District of Columbia and found that the Supreme Court held it to be a deprivation of liberty (in so far as it applied to adult women) within the meaning of that clause.¹³

3. RECENT SUCCESSES. No longer does the Supreme Court of the United States hold that Congress or the state legislatures, in enacting wage and

¹⁰ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹¹ The decision in *Hammer v. Dagenhart* was expressly overruled in the United States v. *Darby Lumber Company*, 312 U.S., 100 (1941).

¹² *Bailey v. Drexel Furniture Company*, 259 U.S., 20 (1922).

¹³ *Adkins v. Childrens' Hospital*, 261 U.S. 525 (1923).

hour laws for women and children, are depriving them and those who would employ them of the liberty of contract under the "due process" clause of the Fifth or Fourteenth Amendment. In 1937 those earlier decisions were explicitly overruled.¹⁴

The Government Contracts Act of 1936 prohibits the employment of boys under sixteen and girls under eighteen years of age by any company fulfilling a contract with the federal government. The Jones Sugar Act of the following year excludes from the benefits of a subsidy any beet grower who "utilized" children under fourteen, except where the parents own at least 40 per cent of the crop. Encouraged by the broader definitions given by the Supreme Court in 1937 to the term interstate commerce, Congress inserted a child labor provision in the Fair Labor Standards Act of 1938. This provision forbids the shipment in interstate commerce of goods mined or manufactured by firms employing children under sixteen years of age, or under eighteen, if the Children's Bureau declares the occupation to be hazardous. Farming comes under the law, but employment outside of school hours or within the family is permitted. Farmers and others affected by the child labor prohibition may employ children who have reached the age of fourteen, except in mining and manufacturing, if the Children's Bureau has found that schooling and health are safeguarded. It is estimated that this statute reaches not more than 25 per cent of the working children, since a large portion of child labor has no relation to interstate commerce. The full national prohibition of child labor would be possible only under the authority of the Child Labor Amendment.

Progress toward industrial peace. Reference has already been made to the methods by which labor and railroad management usually settle their disputes. Organized railroad labor is old and management personnel has among its members not a few men who were formerly associated with labor as fellow-workers. Each accepting the functions of the other, the railway brotherhoods and management enjoy, as compared with labor-management in many industries, harmonious relationships. Perhaps the experience of the railroads in employer-employee relationships may be taken as an indication of the measure of peace which industry generally may enjoy when labor and management have reached maturity.

The Conciliation Service of the Department of Labor extends its good offices throughout the nation in the interest of industrial peace. It investigates the causes of labor-employer disputes as they occur, when such controversies interfere with the welfare of the people of the several states. For convenience in administration it has 16 field offices located at important industrial centers. In the year ending June 30, 1941, it disposed of 5,599 "situations" involving approximately three and one half million persons. The Service justly takes pride in preventing strikes and lock-

¹⁴ *West Coast Hotel Company v. Parrish*, 300 U.S. 379.

outs, and claims that, in 1941, it prevented ninety per cent of the threatened strikes from taking place. The Service seems to have the confidence of a large number of labor organizations and of progressive managements, and should not be condemned for failure to settle all labor-employer controversies.

THE NATIONAL WAR LABOR BOARD. The need for uninterrupted production in the war industries led the President to establish (March, 1941) a Defense Mediation Board, composed of representatives of labor, employers, and the public. Experiencing the fate of some other war agencies, the Board had a short life. In November, 1941, the C.I.O.'s representatives resigned in protest over a decision of the majority, and the usefulness of the Board was at an end. It was succeeded by the National War Labor Board.

The Executive Order creating this Board provides that "the procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (1) The parties shall first resort to direct negotiations or to the procedures provided for in a collective bargaining agreement. (2) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (3) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board.

Here is a board with significant powers for a herculean task. It has trod cautiously, seeking a middle course. While there have been some industrial disturbances since the Board was created, the labor situation in general has been reasonably satisfactory. No sane person ever assumed that this or any other body could settle all labor-employer disputes without friction and without being plagued from both the houses of labor and management.¹⁵

II. THE STATES AND LABOR ¹⁶

As previously indicated, labor, to be within the sphere of national regulation, must be employed by the national government, or be engaged in

¹⁵ Current literature contains much discussion of labor and the war. See "Will Davis of the War Labor Board," *Fortune*, March, 1941, p. 70; and "Absenteeism: New National Malady," *Fortune*, March, 1943, p. 104; Herman Feldman, *op. cit.*; *United States News* and other news magazines.

¹⁶ A. W. Bromage, *State Government and Administration in the United States* (1936), pp. 478-495; A. F. Macdonald, *American State Government and Administration* (1940 ed.), Ch. XXVI; J. T. Young, *The New American Government and Its Work* (1933 ed.), Ch. XXVII. See also references given in note 1, this chapter.

foreign or interstate commerce, or be occupied with activities which feed commerce, or with some other activity which may be covered by a clause of the Constitution. All other labor must look to the states for protection. Before the national government interested itself in labor's welfare, the more progressive industrial states were providing a minimum of protection for labor. At the present time a number of states have rather elaborate sets of labor laws. Naturally, these vary a great deal from state to state; but they commonly apply to such subjects as collective bargaining, hours and conditions of work, wages, labor disputes, and workmen's compensation.

The status of trade unions. The right of labor to organize and bargain collectively with employers is now generally recognized. The right of a particular craft to strike for such purposes as an increase in wages or to prevent a reduction is also recognized; but striking simply to assist another union is generally held to be illegal.

The methods which the strikers may employ are limited. The "sit-down" strike was declared illegal by the Supreme Court of the United States.¹⁷ Picketing is usually permissible if it consists only of attempts to persuade others not to take the strikers' jobs. Intimidation by threats or violence is illegal. The difficulty of drawing a line between persuasion and intimidation is at once apparent. Employers often seek injunctive relief against strikers and they frequently obtain it. Some states have attempted to limit this form of action in labor disputes; but an act of the Arizona Legislature prohibiting the courts of that state from granting injunctions to employers was held by the Supreme Court of the United States to be in violation of the "equal protection" clause of the Fourteenth Amendment.¹⁸ Anti-injunction laws not so sweeping in their provisions as the Arizona law are, however, commonly upheld, and at least a third of the states now have statutes on their books modeled somewhat after the Norris-LaGuardia Act, mentioned in the first section of this chapter. The primary boycott (the refusal of a union group to patronize an "unfair" employer) and the secondary boycott (the attempt of a union to prevent third parties from patronizing an employer) are both illegal in many states, being considered conspiracies to injure the employer's business. These are but general statements concerning the status of unions, and they must necessarily be of that type because of variations among the states both as to legislative acts and judicial decisions.

Hours of labor: 1. MEN. A few decades ago, the hours of work, like all other problems of labor, were left entirely to the employer and the employee to determine. But the great advantage of the employer over

¹⁷ *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939).

¹⁸ *Truax v. Corrigan*, 257 U.S. 312 (1921).

the employee has led many states to come to the assistance of the latter. Men are still expected to be able to take care of themselves, but there are certain exceptions to be noted. Quite a few states have fixed the eight-hour day for those employed by them or by local governments. It seems also that states may require contractors on public works to observe the eight-hour day. Such laws exert an appreciable influence over private employment.

There is no question of a state's authority to fix the hours of labor for its own employees. How far can it go in fixing a limit for private employees? Such laws interfere with the freedom of contract and may be judicially stricken down as being in violation of constitutional provisions that no person shall be deprived of life, *liberty* (of contract in such cases), or property without due process of law. But where the courts are convinced that labor is in actual need of protection, they hold that the freedom of contract must give way to the police power of the state. Thus, as long ago as 1898, the Supreme Court sustained a Utah statute limiting labor in mines to eight hours a day.¹⁹ A few years later it held invalid a New York statute limiting labor in bakeries to ten hours,²⁰ although in 1917 this decision was practically overruled when the Oregon ten-hour factory law was sustained.²¹ There is now no doubt that the states may limit the hours of labor of men in dangerous or unhealthful employment; and it is generally believed that, in keeping with the policy of the national government to limit hours, they may limit the hours of employment in industry generally.

2. WOMEN AND CHILDREN. Recognizing the difference between the physical capacity of men and women, the courts have generally upheld statutes for the protection of women which would have been declared invalid if applied to men. "Due process" has been made to yield to the obligation of the states to safeguard their women. Child labor legislation easily passes judicial scrutiny. Children are wards of the state, and the state owes them special protection. In many states, children under fourteen, or perhaps fifteen or sixteen, may not be employed in mines and factories, and children within a specified age group above this limit may not be employed beyond a stipulated number of hours. The hours of labor for children often are limited in other types of employment. Not infrequently night work is prohibited altogether. Compulsory school attendance laws also have the effect of limiting child labor. It should be added that child labor laws, like any others, are sometimes indifferently enforced.

¹⁹ *Holden v. Hardy*, 169 U.S. 366.

²⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

²¹ *Bunting v. Oregon*, 243 U.S. 246 (1917). On the application of "due process" to this and the cases mentioned in notes 19 and 20, see Ch. 5, Sec. IV.

Conditions of work. Some years ago a miner, humorously fatalistic, told the writer that he always examined his lunch before going into the mines and that if he found articles of diet for which he had a particular weakness, he ate them at once, not risking the chance of being deprived of them by being killed before twelve o'clock! The hazards of mining are not so great now as they were; for the states have made serious attempts to lessen them. The requirements for ventilation, safety lamps, and various other safety appliances, enforced by inspection officers, have added somewhat to the miner's allotment of years. Factories are similarly required to provide for the safety of their employees. Whizzing saws and other dangerous machinery must be covered as far as possible. Suction pipes must be installed to take up the dust which would otherwise go into workmen's lungs. The manufacturing of articles in the home of workers, commonly called "sweating," is prohibited or restricted in many states. Laundries and bakeries must conform to standards of sanitation fixed in the interest of the health of employees and the public. These are but a few typical health, safety, and comfort measures which the states have enacted for employees. Usually they are upheld as being proper exercises of the states' police power, due process of law being reserved to strike down those measures which, in the opinion of the courts, are improper or arbitrary uses of that power.

Wages. The freedom of contract gives way in certain particulars to the urgent necessity of protecting labor in the collection of wages. The Supreme Court of the United States has held valid a Tennessee statute which required that store orders issued in payment of wages must be redeemed in cash.²² The same Court upheld an Arkansas statute providing that, where miners were being paid by the ton for their output, coal should be weighed before being screened.²³ Of course it was argued that such statutes deprived employers and employees of their freedom to make the kind of labor contracts they desired, and that the statutes were therefore contrary to "due process"; but the Court said in the latter case: "laws . . . enacted for the protection of the public health, safety, or welfare . . . may be valid notwithstanding they have the effect to curtail or limit the freedom of contract."

But when states attempt to fix minimum wages, they soon run against the constitutional snag of "due process." Of course the states may fix wages for those employed on public works; but fixing wages for private employment is another matter entirely. So far they have attempted to do so only for women and children. Congress, the legislatures in a third of the states, and the legislative bodies in nearly all of the European countries at one time or another, have enacted such laws. The supreme courts in several of the states sustained them, and the Supreme Court of the

²² *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901).

²³ *McLean v. Arkansas*, 211 U.S. 539 (1909).

United States, by an equal division (Mr. Justice Brandeis not sitting), affirmed the favorable decision of the Supreme Court of Oregon.²⁴ A few years later, however, the Supreme Court held invalid the act of Congress which provided for the minimum wage for women and children in the District of Columbia.²⁵ In 1933 the New York legislature passed a carefully drafted minimum wage law designed to overcome the objections the Supreme Court had made to the law Congress had enacted for the District of Columbia. But the Court found, five to four, the New York Act to be an oppressive exercise of the police power, an infringement upon the "freedom of contract" of workers and employers, and therefore in violation of the due process provision of the Fourteenth Amendment.²⁶ "It is difficult to imagine any grounds," said Justice Stone, in dissent, "other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest." Ten months later, the five-four majority against minimum wages changed to five-four for minimum wages, Justice Roberts shifting his position. Speaking for the new majority, Chief Justice Hughes declared: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."²⁷ It seems, then, that the states may now have their minimum wage laws for women and children.

Restricting the sale of products of convict labor. In order that convicts may earn a part of their keep, receive the disciplinary benefits of labor, and learn a trade which will help them take an honorable place in society upon their discharge, the states commonly put them to work. Formerly, the services of convicts were often contracted to private individuals on a per diem or piece-work basis. As this was subject to grave abuses, nearly all the states have given it up and now furnish employment directly for their convicts. In a number of jurisdictions they are employed on public roads. In practically all prisons there are shops in which articles are made for state use or for sale by the state. In either case, particularly in the latter, the state is competing with private business and free labor. Organized labor is especially hostile to this form of competition, and, in response to labor's insistence, some states have limited the articles which may be produced by prison industry to those which are needed in state institutions. But, whatever a state may do respecting its own prison labor,

²⁴ 243 U.S. 629 (1917).

²⁵ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

²⁶ *Morehead v. New York*, 298 U.S. 587 (1936).

²⁷ *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937).

it cannot, without authority from Congress, interfere with interstate commerce to the extent of preventing the shipment into it and the sale within its borders of goods manufactured in the prisons of other states. Heeding the demands of labor, Congress, by an act of 1935 granted the states the substance of this authority.

Settlement of industrial disputes. The great waste caused by industrial disputes, usually differences between employers and employees over wages, has led a number of states to provide means of mediation and arbitration for the contending parties. A board or commission is created which may, upon its own motion or upon request of one or both parties, attempt to settle the points at issue. Sometimes, where both parties have agreed to arbitration, the terms of the settlement are binding upon the disputants; but more commonly the acceptance of a suggested settlement depends upon their mutual satisfaction with the results obtained. A rather typical settlement was reached in New York in 1932. When 27,000 garment workers and their employers failed to reach an agreement over wages and other matters, Lieutenant Governor Lehman was called in to act as mediator. After a week of conferences with the various groups, he obtained the acceptance of terms which averted a strike and which were announced by those most vitally concerned as a "victory for all parties."²⁸ Without troops, without police, and, more significant, without the support of an arbitration law, Governor Gardner of North Carolina went to High Point and settled a wage strike in twenty-four hosiery mills. Said he, "A strike like this is war and war is insanity." He persuaded both sides to appoint a board of arbitration and to agree to accept the decision of the board. Headed by the Governor, the board reported its findings—compromises—at the end of four hours. "Let's get closer together," exclaimed the Governor, being photographed with leaders of the recent strike.²⁹

Many disputes are not settled by such voluntary co-operation. To save losses to employers, employees, and the public which result from strikes, some states have added mandatory features to laws relating to such disputes. For example, Colorado (1915) empowered its industrial commission to compel a hearing in labor disputes and to prohibit strikes and lockouts until after the commission had made its report. Kansas went a great deal farther. An act of 1920 created a court of industrial relations and authorized it to investigate and make compulsory settlements of labor disputes in various essential industries, including public utilities, mining, food, fuel, and clothing. The statute created the widest interest and was a common subject of debate for a few years. It was not long, however, until the legal features of the debate were settled by the Supreme Court of the United States. A section of the statute was declared unconstitutional on the ground that it was a limitation upon the freedom of contract pro-

²⁸ *New York Times*, July 24, 1932, p. 1.

²⁹ *Time*, August 15, 1932, p. 11.

tected by the due process provision of the Fourteenth Amendment,³⁰ and, later, the whole statute was declared void because, in the opinion of the Court, the food, clothing and fuel industries were not sufficiently affected with a public interest to justify compulsory arbitration.³¹

Workmen's compensation for accidents. Tens of thousands of workmen are killed and injured in line of duty every year. Formerly, the only method by which they or their relatives could obtain compensation was to institute suit against the employers. Occasionally, handsome damages would be collected by a lawyer who impressed a jury with his pleas for a wife, or widow, and six dependent children of the victim of an industrial accident. But more often the employers were saved by the old common-law defenses of "contributory negligence," "fellow servant," and "assumption of risk," as explained in the preceding section. Nearly all the states have abolished these defenses in industrial accident cases, thus placing employees in a much more favorable legal position. But many states have gone beyond this. They have provided for systems of industrial insurance.

This is the way a typical system works: Employers are required to establish funds from which compensation shall be paid to injured workmen. Such workmen no longer go to court for compensation; but an industrial commission hears their cases and fixes the amount of compensation for each in proportion to the extent of the injury. The procedure is relatively speedy and free from technicalities, the employer being no longer allowed to set up the old common-law defenses noted above. These laws in the interest of the disabled veterans of industry who had been engaged in developing the wealth of the state may be sustained upon the same theory as pensions for soldiers wounded in defending it. "A machine as well as a bullet may produce a wound and the disabling effect may be the same," said the Supreme Court of the United States in upholding a statute of the State of Washington.³² Sickness, as well as accidents, may arise from causes directly traceable to employment. Accepting this fact, a number of states have extended the provisions of their compensation acts to cover diseases attributable to occupations. One other method of offering relief to disabled industrial workmen deserves mention. A man may be incapacitated for his own trade, but he may be trained for another. This is called vocational rehabilitation, and Congress has recognized its importance to the extent of providing federal aid to the states for the purpose.

Unemployment relief. This subject is covered in the section (V) on Social Security in Chapter 25.

Administrative organization. Of course, administrative authority must

³⁰ *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 525 (1923).

³¹ *Same*, 267 U.S. 552 (1925).

³² *Mountain Timber Co. v. Washington*, 242 U.S. 219 (1917).

be created to enforce state labor legislation. Laws must be interpreted and applied to particular cases. The courts perform these functions to some extent; but the essential features of the types of laws discussed above require special administrative agencies for their application. Labor statistics are often collected by a bureau of that name. Employment service is maintained by an appropriate agency. Factories and mines must be inspected by duly qualified officers. Workmen's compensation commissions must pass upon accident claims. In fact, every separate service established by labor laws must have its administrative agency. In a number of states, each of these agencies operates with scant regard for the fact that they all are working on the same general problem. But these related activities are usually combined in a single department of labor in those states which have given most attention to administrative organization.

An unsolved problem. Despite the flood of labor legislation in our generation, the story is by no means ended. Employee-employer relationship is one of the greatest problems of our time and it will doubtless continue with us. At the time of this writing labor is being criticized for the 40-hour week, for its efforts to enforce the closed shop at war plants, for double-time pay for holidays and Sundays, for high initiation fees, for taking days off from work essential to the war program, for spending so much money, and for drinking too much. It is not possible to examine each of these charges, but it would be a relatively simple matter to find charges against any other group in our society to match those made against labor.

Why, then, is the criticism directed primarily at labor? It is because a large segment of American industry and perhaps an equally large part of the public has not yet accepted labor as one of the dominant forces in society. Originally American civilization was primarily agricultural; later manufacturing, mining, and business dominated our thinking, although the farmer was not forced out of the picture. A generation ago organized labor entered the scene. It is new; it is fighting for a place, sometimes almost as aggressively and as ruthlessly as the "robber barons" of industry fought in the generation following the Civil War. The "captains of industry" and "the admirals of commerce" made their millions and gave some of them to schools and libraries. Today we "tut-tut" some of their methods, but we speak of them tolerantly, and label them as great Americans of the frontier days. Labor is with us right now. It is roughly pushing its way into the American economic and political system and to some extent weakening the business man's control of government.

Labor is not therefore popular with the business man or with the public which idealizes him. Furthermore, the excesses of labor are so obvious. When it strikes, it does not attempt to keep it secret; on the contrary it stages a parade. Contrast this with the industrial combinations in restraint of trade, worked out in secret by highly paid legal talent, and se-

cretly put into operation. If a laborer manages to make three or four hundred dollars a month, he probably spends a lot of it lavishly and in what those who are attached to the business civilization call bad taste. This same public does not, however, particularly object when it hears of a farmer making thousands while the laborer makes his hundreds; nor does it receive with pleasure the news that salaries have been limited to \$25,000 for the duration of the war. To make an end of this discussion, it is suggested that when the general body of employers and citizens arrive at the day in which they concede that labor is entitled not simply to subsistence, but to a large share of the good things which America has to offer, the labor problem will be well on the road to solution.

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Agriculture and Conservation

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The farmer sometimes feels that he has not received his share of government favors; that industry and labor have been heeded while the tillers of the soil have been largely ignored. It is true that industry has had greater influence than agriculture in the councils of state during the past sixty years; but labor has not. The government has not ignored the farmer; but low prices for his commodities, even when industry and labor prosper, very naturally cause him to lose sight of what has been done for him. Just what are the evidences of government interest in the farmer? We shall discuss the national government's efforts on his behalf, and then give a brief summary of state measures affecting him.

I. GOVERNMENT ASSISTANCE TO AGRICULTURE ¹

Occupation and reclamation. For one thing, from the time of its creation the federal government has aided the farmer by letting him have its lands at practically no cost. In the past thirty years it has further aided him by using its resources to redeem vast arid regions for agriculture. Both of these policies are briefly discussed in section II of this chapter.

Scientific research. No department of the national government is more scientific than the Department of Agriculture, which employs numerous experts in many lines to make studies and conduct experiments and pass the information on to the general body of farmers. Here are some samples of this interesting and valuable work.

1. **CHEMISTRY AND SOILS.** Perhaps the reader is not concerned about the loss that results from the decrease in weight and nutritive value of hay which occurs during spontaneous heating; but the Bureau of Agricultural Chemistry and Engineering tells us that spontaneous heating takes well over \$100,000,000 from the value of our national hay crop each year and that the Bureau is conducting researches in experimental barns to discover practical means of reducing these losses. In an important straw-

¹ C. A. and Wm. Beard, *The American Leviathan* (1930), Ch. XVI; J. S. Davis, *On Agricultural Policy, 1926-1938* (1939); E. F. Dummeier and R. B. Heflebower, *Economics with Applications to Agriculture* (1940 ed.), Chs. XIX-XXIX; E. S. Sparks, *History and Theory of Agricultural Credit in the United States* (1932); *Annual Reports of the Secretary of Agriculture*.

berry-growing district of North Carolina, growers put down their fertilizer in two applications, one after the berries were picked and the other during the winter. Following experiments by our scientific Bureau, the growers put down all the fertilizer in one application, in the early fall, and the next spring picked from 400 to 500 more quarts of berries per acre than formerly.²

2. SOIL EROSION CONTROL. Mistaken land-use practices in the United States have caused the ruin by erosion of nearly 300,000,000 acres of land and seriously damaged as many more. "Erosion dissipates fertile soil in dust storms, piles up soil on lower slopes, covers rich bottom land with poor subsoil, destroys food and cover for wildlife, and increases flood hazards. Furthermore, it causes the silting and sedimentation of stream channels, reservoirs, dams, ditches, and harbors, and damages roads, railways, irrigation works, power plants, and public water supplies." The picture is dark, but not overdrawn. The Soil Conservation Service of the Department of Agriculture is studying this problem on scores of demonstration projects and has prepared a soil conservation plan for each demonstration area. This Service encourages the organization among farmers of voluntary soil conservation associations, of which there are now about 750. Among the other duties of the Service is that of making investigations of watersheds and measures for the prevention of soil erosion on watersheds under the Flood Control Act of 1936.³

3. PLANT INDUSTRY DEVELOPMENT. The Bureau of Plant Industry is equally busy and scientific in its domain. It finds that longer staple varieties of cotton can be grown in many localities which now grow the shorter and less desirable varieties. It obtains exceptionally good results in tests of a new variety of tomato, the Break O' Day, finding it both early and wilt resistant and unusually responsive to cultivation except under conditions of abnormally high temperature. The Bureau reports important progress in the development of sugar beets resistant to the curly-top disease, having developed disease-resistant strains by selection from commercial strains, and by crossing commercial beets with wild beets of the *Mediterranean area*. It discovers that by "pre-icing" refrigerator cars some hours before fruit is loaded, shippers may save thirty dollars or more per car on oranges freighted from California to New York.⁴ The Bureau is now actively engaged in aiding farmers to produce strategic crops that were formerly imported, and in co-operating with Latin-American countries in the production of those plants from which medicines, oils, rubber and other products are derived.⁵

4. ANIMAL AND DAIRY INDUSTRY. The Department of Agriculture is

² *Report of the Secretary of Agriculture* (1931), pp. 73 ff.

³ *Ibid.*, pp. 18 ff. 1936, pp. 18 ff. and *United States Government Manual*, Fall 1942, pp. 293-294.

⁴ *Ibid.* (1931), pp. 63 ff.

⁵ U.S. Manual, Fall, 1942, p. 307.

equally devoted to research in the animal industry and dairying. The Bureau of Animal Industry tells the farmer that experiments have demonstrated, contrary to general belief, that a hog should not have all he can eat. True, hogs fed a limited ration make less rapid gains and require longer feeding periods than those fed a full ration; but the former are more efficient in utilizing their ration and require much less feed per hundred pounds of gain than do those fed a full ration. Furthermore, limited feeding produces somewhat leaner carcasses, an advantage to the hog raiser, since the American consumer is now willing to pay higher prices for leaner pork. For years the Bureau has been co-operating with state authorities in the eradication of bovine tuberculosis, and has reduced infection among cattle to a marked degree. The elimination of tuberculosis from poultry and swine has also received the attention of the Bureau. Dairy research is conducted by the Bureau of that name. Its studies include various phases of such problems as dairy-cattle breeding, improving the quality of milk, and the manufacturing of dairy products. It makes particular efforts to learn and place at the disposal of manufacturers improved methods of manufacturing cheese, certain types of imported cheese still being preferred to competing American brands.⁶ How may dairymen produce more milk to meet the war demands? Feed the cows heavier; give them more grain, advises the Bureau of Dairy Industry.⁷

5. SCIENTIFIC WARFARE AGAINST PESTS. The farmer has many foes in the kingdom of animals, insects, fungi, and bacteria. In his wars with them the United States Government is his powerful scientific ally. Predatory animals such as wolves raid his stock; rats and other rodents devour his garnered crops. The Bureau of the Biological Survey lends various types of assistance in their extermination. Particularly effective is science in the eradication of rats and other rodents. Armed with chemicals recommended by the Bureau and using them according to directions, any farmer may march forth against rats as effectively, if not so picturesquely, as the Pied Piper of Hamelin.

Insect pests, doing the farmers an annual damage running into hundreds of millions through attacks on their crops and flocks, exist in hundreds of species, each species occurring in myriads. The European corn borer, the Mexican bean beetle, the oriental fruit fly, the plum curculio, grasshoppers, chinch bugs, buffalo gnats, common cattle grubs, southern pine beetles, black flies, and cattle-fever ticks are but a few destructive varieties. Even a farmer's tobacco stored in a warehouse is not safe from pests. An army of cosmopolitan moths may go forth and destroy it. Drought, which of itself spells loss or even privation for the farmer, may further distress him by reason of the fact that it is favorable to the multiplication of cer-

⁶ *Report of the Secretary of Agriculture*, 1937, pp. 56 ff.

⁷ *Ibid.*, 1941, pp. 117-118.

tain insect pests, reducing disease among them and aiding their hibernation. The Bureau of Entomology is busy studying insect pests of all kinds, learning their life history to find the most favorable time for attack, and testing ammunition to discover the most effective charges that might be used against them. The grasshopper outbreak of 1931 was predicted by the entomologists. They pointed out that effective control was "possible chiefly against the 'egg beds' and against the newly hatched hoppers"; that eggs could be destroyed by cultivating the spots where grasshoppers had collected for oviposition; and that the young insects could be destroyed by poisoned bran baits. Unfortunately, this advice was not heeded to the extent of taking adequate steps to control the grasshoppers.⁸

The Bureau of Plant Industry, in addition to its work mentioned under paragraph 3, is engaged in the study of plant diseases. For example, it reports distinct progress since 1918 in the control of stem rust of wheat through the eradication of some 18,000,000 barberry bushes. It is estimated that before the campaign against stem rust was launched, the rust caused a loss of about 57,000,000 bushels of wheat each year, a loss estimated to have been reduced to 10,000,000 bushels a year following 1926. A rapid and devastating spread of the white pine blister rust was discovered in Montana, Idaho, and Washington. How could the disease be controlled? By a systematic eradication of currant and gooseberry bushes, advised the Bureau.⁹ The Bureau of Agricultural Chemistry comes to the aid of sick plants by experimenting with fumigants and insecticides. Those having knowledge of the toxic powers of nicotine may be impressed with the news that experts in the Bureau have developed a synthetic organic compound, *neonicotine*, which is much more toxic than nicotine when sprayed upon plant lice. Revealing the far-flung and persistent activities of agricultural experts, the report from which the foregoing information was taken concludes: "A common Russian weed, *Anabasis aphylla*, was recently found to contain as much as 2 per cent neonicotine and related alkaloids. Efforts are being made to introduce the cultivation of this plant into the United States."¹⁰ Indeed, scientists of the Department of Agriculture have studied plants and diseases of plants in practically every country of the world.

Quarantines. To fight an insect or fungus outbreak successfully and to protect the country from its ravages, it is necessary to localize the conflict. Consequently, the Secretary of Agriculture is authorized by an act of Congress to place a plague area under quarantine. He may not issue such an order, however, until after state officers and interested private parties have been heard. The state affected, often with the aid of federal funds and federal employees, then undertakes measures of eradication. The

⁸ *Ibid.*, 1931, pp. 66 ff.

⁹ *Ibid.*, p. 65.

¹⁰ *Ibid.*, pp. 73-74.

Mediterranean fruit fly outbreak in Florida made necessary a quarantine there from May 1, 1929, to November 15, 1930. During the greater part of this period, state and federal agents were locating and destroying infestations, the last one being found in a dooryard in St. Augustine, July 25, 1930. The quarantine prevented the spread of the insect to other states, and while it resulted in some temporary losses to Floridians, these losses were offset many times by the assurance of open markets for their pest-free products. A Japanese beetle quarantine during 1930-31 was similarly successful. While nurserymen and other interested parties were co-operating with federal agents in preventing the spread of the pest, federal inspectors were issuing clearance certificates for plants not infested, thus assuring their acceptance at their destination without fear of infestation.¹¹

6. SCIENCE AND THE WEATHER. A college janitor, one of whose many duties was to hoist the indication flags for a weather forecaster, often piously observed, "I wish Professor Simeon would let the Lord regulate the weather." Of course the forecasters cannot "do anything about the weather"; but they can tell us within a fair degree of accuracy what the weather is going to do for us. This information is invaluable to navigators on the sea and in the air. It is hardly less valuable to the farmer. The navigator must have it to bring his ship and passengers safely to port; the farmer must have it to save his stock and crops, although at times he may not be able to meet adverse weather conditions with sufficient defenses. The Weather Bureau was formerly located in the Department of Agriculture, but it is now in the Department of Commerce. With its stations all over the country, connected by the most improved methods of communication, the Bureau is able through the press, flags, whistles, and, most important of all, radio, to advise the farmers in each locality of coming changes in the weather. Warned of approaching frost, the wise fruit grower lights his "smut pots" in his orchards; warned of floods, the stockman drives his cattle and sheep from the lowlands; and so on.

7. ELECTRICITY ON THE FARM. In 1933 the Electric Farm and Home Authority was created for the purpose of aiding in the distribution, sale, and installation of electrical apparatus in such a manner as to enable home and farm owners to use electricity at low cost. It was authorized to extend credit facilities for the purchase of such apparatus and to co-operate with publicly and privately owned utilities and dealers in electrical appliances to facilitate the use of electricity on a sound and economical basis. In 1936 a Rural Electrical Administration was established by act of Congress. The Administration was allotted a sum of money for a ten-year program, and it was authorized to supervise a program of approved projects with respect to the generation and distribution of electric energy in rural areas. Under certain conditions it may lend the entire cost of power lines in areas that are without them. It should be mentioned that

¹¹ *Ibid.*, pp. 71-72.

farm areas in some parts of the country have long been served by private light and power companies. The federal action was designed to give impetus to the extension of such services and the number of farms receiving electrical energy is now well over three times the number receiving it in 1935.¹²

Importance of scientific aids to the farmer. These few pages on scientific aids to agriculture will serve to illustrate the importance of this help to the farmer, to those handling agricultural products, and to those consuming them. It is impossible to estimate its value. Certainly its value far exceeds its cost. It is for the most part undramatic work, and fails to receive general attention. Consequently, in times when legislators are casting about for services on which to reduce budgets, they are not unlikely to pick the type just described. In 1932 an item was included in the Agricultural Appropriation Bill for carrying on war against grasshoppers; but it was eliminated when objections were raised, and the grasshoppers won the war without a battle.¹³

Agricultural education. Although much of the scientific information gathered by the Department of Agriculture passes directly to farmers, a great deal more of it does not. "Middlemen" are needed to help pass the facts on to the farmers and to assist them in their interpretation. These men are found on the faculties of colleges established under the terms of the Morrill Act, and in agricultural extension work.

1. COLLEGES. First, a word must be said about the colleges. Under the provisions of the Morrill Act of 1862 and later supplementary legislation, nearly 11,000,000 acres of public land, much of it very valuable, have been set aside for the states, each state sharing the land in proportion to its representation in Congress, and each assuming the obligation to use the proceeds from such lands to maintain one or more colleges in which shall be taught "without excluding other scientific and classical studies and including military tactics, . . . such branches of learning as are related to agriculture and the mechanic arts." Colleges and universities established under the terms of this act are the familiar land-grant colleges. Under an act of 1890, additional aid came to the colleges in the form of annual appropriations from the federal treasury. The Nelson Act (1907) and the Bankhead-Jones Act (1935) further increased the appropriations.

In the original grant, the federal government made practically no attempt to supervise the states in their use of the funds; but it developed that some control was desirable. A number of the states sold their land grants and at such low prices as to suggest scandal. Consequently, in 1889, Congress decreed that no state admitted to the Union thereafter should sell the land for less than ten dollars an acre. In 1890, with the beginning of annual appropriations, Congress directed the Secretary of the Interior

¹² *Ibid.*, 1941, pp. 222-223.

¹³ E. F. Brown, "America's Efforts for Recovery," *Current History*, August, 1932, p. 583.

to see that the colleges were fulfilling their purposes before he approved the annual allotments. Central control, inevitable in such cases, has increased a bit in recent years. Through its appropriations of funds for education in agriculture and the mechanic arts and through ever-increasing stipulations as to their specific uses, the federal government is able to carry out a national educational policy.¹⁴

2. EXPERIMENT STATIONS. To give instruction in the principles of agriculture, leaders in this type of education early recognized the necessity of adequate facilities for experimentation. It was in response to their demands that Congress, in 1887, passed the Hatch Act, establishing an experiment station in every A. and M. college, allowing each state a lump sum for that purpose. Allowances were later increased, and with them, as in the case of the colleges proper, came an increase in federal control. Funds for these stations now total about \$18,000,000 annually. About one third of this comes from the federal government, the remainder from state and local governments and private sources. Thousands of research projects are under way at the stations every year. The federal government, through its Office of Experiment Stations, co-operates in such experiments as are of general importance. The problems have to do with the production, distribution, and sale of farm products, with the needs of the farm home, and with rural community matters. Results of experiments and investigations are disseminated by colleges, books, bulletins, the press, and the radio. In carrying them to the farmer for practical use, the extension services are of particular value.

3. EXTENSION SERVICE. Though many farmers may send their sons and daughters to the agricultural colleges, only a few farmers themselves can arrange to attend. Besides, the farmer wants his particular problems met a little more directly than it is possible to meet them in a general college course. In recognition of this situation, Congress passed the Smith-Lever Act in 1914, providing instruction and practical demonstrations in agriculture and home economics for persons not attending college. This act was not just a federal "hand-out" to the states. There were strings attached. The money was not to be divided equally among the states; but, excepting a sum of \$10,000, each state was to receive a sum which bore the same relation to the total sum appropriated as its rural inhabitants bore to the total rural population of the United States. More important, each state receiving the federal funds was required to "match the federal dollar"; that is, appropriate a like sum from its own treasury for the same purpose. Furthermore, the states were required to submit their plans for using the funds of the Department of Agriculture for its approval. Thus, to secure federal funds for extension work, the states must not only assume financial obligations, but they must allow the federal government

¹⁴ W. Thompson, *Federal Centralization* (1923), pp. 147-152.

an important voice in determining the details of their expenditure. This is now a common arrangement respecting any "federal aid" money.

Under the Smith-Lever and other extension acts, Congress appropriated about \$19,000,000 for the fiscal year 1942. The states, counties, and other agencies appropriated varying amounts. The extension service now includes hundreds of specialists stationed usually at the state colleges of agriculture, and a much larger field force of county agents, home demonstration agents, and others. These agents lend assistance wherever possible, both to the individual farmer and to the farm community. In recent years they have been particularly active in aiding farmers in supplementing the sources of farm income and in encouraging them to produce their own supplies. Not the least important work of the extension service is its contact with boys and girls. Under expert supervision, they are organized into "4-H" clubs and encouraged to grow vegetables, raise stock and poultry, can fruit, and so on.

We may conclude, then, that the federal government gives very material support to agricultural education, and that, in promoting such education, the national and state governments co-operate both in finances and functions in such a way as to cause an individual concerned about the division of powers between the two governments to scratch his head in bewilderment.

Agricultural credit. Large-scale farming and expensive farm equipment, necessitating larger capital outlays than formerly, led the federal government to come to the assistance of agriculture in the matter of credit. President Theodore Roosevelt's Country Life Commission and a commission appointed by President Wilson to study rural credits explored the field, and the report of the latter commission had great weight in shaping a farm loan system.

Beginning in 1916, credit agencies were created from time to time, and as their number and duties increased the need for a unified system became apparent. This need was met in 1933 by the establishment of the *Farm Credit Administration* whose administrative head holds the title of Governor. Functioning since 1939 as a unit of the Department of Agriculture, this Administration supervises and co-ordinates the activities of land banks and other corporations and organizations authorized to extend agricultural credit. On occasion it takes a direct part in loan activities.¹⁵

1. **FEDERAL LAND BANKS.** The Farm Loan Act (1916) established the federal land banks and created the Federal Farm Loan Board to administer them. In response to great pressure from those interested in joint-stock land banks, Congress permitted them to continue to operate, but they were required to come under the supervision of the Farm Loan Board.

¹⁵ For the period of the war, perhaps for a longer period, the Farm Credit Administration has its main offices in Kansas City, Missouri.

In 1933 Congress withdrew the authority of the joint-stock banks to make additional loans. There are twelve federal land banks located with due regard for the agricultural interests of the country.

How does the farmer borrow from these banks? Ordinarily, a farmer must present his request for a loan to the secretary-treasurer of the local farm loan association and an appraiser for the land bank. If the request is approved, the farmer may borrow, at a relatively low rate of interest and for from five to forty years, up to 50 per cent of the appraised value of his land and 20 per cent of the value of his insured permanent improvements. He gives the association a first mortgage, which is endorsed by it and forwarded to the district land bank. This mortgage, along with many others, is used as security for bonds sold to the investing public by the land bank to get more money to lend to other farmers. Coming back to our particular mortgage—the land bank sends the loan to the local association, which is required to subscribe to the capital stock of the land bank in an amount equal to 5 per cent of the loan. The farmer is required to subscribe to an equal amount of stock in the local farm loan association. This is the common procedure, but in recent years it has been possible for farmers to borrow directly from the land banks.

2. **FEDERAL FARM MORTGAGE CORPORATION.** Many farm mortgages went into default during 1930–1933 and it became necessary for the central government to extend aid to the farmers and the land banks. The Federal Farm Mortgage Corporation was created in January, 1934, for the purpose of refinancing these farm mortgages. This Corporation may issue bonds to the amount of \$2,000,000,000, the principal and interest of which are fully guaranteed by the United States. These bonds are given to the land banks in exchange for their bonds. By this procedure the land banks are placed in a position to extend more credit to the farmers. The Land Bank Commissioner may make farm mortgage loans of an emergency character, the federal land banks acting as his agents. The Commissioner gets his money for his purpose from the Farm Mortgage Corporation.

3. **INTERMEDIATE CREDIT BANKS.** The federal land banks take farmers' land mortgages and give long term credit. Often the farmers want credit for shorter terms than these banks can extend it and they want to offer other security than land. They want loans for a few months or a year or two on wheat, cotton, apples, hogs, and other products and live stock. Congress came to their aid in 1923 with the Agricultural Credits Act, an omnibus measure combining the more important parts of several bills introduced to meet the farmers' demands. The principal features of the act are those relating to the intermediate credit banks. Twelve such banks were established as separate divisions of the federal land banks. The farmer who wants money on his crops or live stock may get it from a local loan institution such as a bank, an agricultural credit corporation, or a live

stock loan company. The local institution may then go to an intermediate credit bank and discount the paper the farmer has given as security for his loan. The intermediate credit banks also serve the farmer by making loans to agricultural and live stock co-operative associations, associations formed by the farmers for the purpose of obtaining loans.

4. **BANKS FOR CO-OPERATIVES** have been set up in each of the twelve farm credit districts for the purpose of making loans to farmers' co-operative associations. Loans may be made for the purpose of financing the handling of readily marketable commodities, for financing the operations of the co-operatives, for the construction or purchase of physical facilities, for merchandising agricultural products, and for similar purposes.

5. **PRODUCTION CREDIT CORPORATIONS** were set up at the same time (1933) the banks for co-operatives were organized. Through combined action with the intermediate credit bank in each district, the credit corporations form a short-term credit system for general agricultural purposes. Loans are advanced for such purposes as raising livestock and improving farm equipment and buildings. The farmer must submit his application for a loan through his local production credit association. The production credit corporation in each farm credit district assists in the organization of these associations and provides most of their capital.

6. **THE COMMODITY CREDIT CORPORATION** (chartered in 1933) is empowered to buy and sell and otherwise deal in agricultural commodities. It is given wide powers to finance these activities. An act of 1941 authorizes it to have outstanding as much as \$2,650,000,000 in bonds and notes, which obligations are fully and unconditionally guaranteed by the United States. The Corporation utilizes its funds for the purpose of making loans on purchasing agricultural commodities to stabilize farm prices and promote orderly marketing. Producers are not required to make up the difference if the proceeds from the sale of commodities are less than the amount of the loan for which the commodities were pledged. This is quite a boon to the farmers, considering that the act of 1941 fixes the loan at 85 per cent of parity. Loans have been made on a dozen or more commodities, but principally on corn and cotton.

The exigencies of war have led the Corporation to employ its funds to protect the farmers from the results of abrupt dislocations of export trade and for the expansion of scarce and essential agricultural products. In prosecuting the war the Commodity Credit Corporation buys foreign agricultural commodities required by the United States and its allies; and to help effectuate the program of hemispheric solidarity, it purchases and stores in Latin-American countries commodities to which war has closed the possibility for exportation.¹⁶

7. **LOANS TO SMALL FARMERS.** Since 1937 help for the small farmer is available through the emergency crop and feed loan section of the Farm

¹⁶ *U.S. Government Manual*, Fall, 1942, pp. 301-302.

Credit Administration. Loans of this character are ordinarily limited to \$400 for any one borrower, and they are usually advanced only to those in distress caused by such disasters as droughts and floods.¹⁷ Another poor man's friend, created in 1935, is the Farm Security Administration, which is concerned primarily with rural rehabilitation. It makes loans to low-income farmers for the purchase of farm and home supplies, machinery, equipment, live stock, seed, feed, and fertilizer, refinancing, and even for family subsistence.¹⁸

Agricultural marketing. The government services in respect to soils, plants, the weather, and other matters which particularly lend themselves to scientific investigation, materially aid the farmer in producing better and larger crops. The credit facilities just discussed similarly aid the farmer, especially in the direction of large-scale production. When the crops are harvested and the livestock is ready for slaughter, the farmer must find a market. Here, again, the federal government offers a variety of services. There is special need for them. The farmer has often been the victim of sharp market practices, and there is often a surplus of farm produce. Perhaps it may be said also that the government is under a special obligation to furnish marketing assistance, since its scientific aid is partly responsible for the farmers' surplus. There is space only for a bare enumeration of the more important work of this agency.

1. **CROP AND MARKET NEWS.** Growers and buyers must have information concerning crops and markets the country over in order to proceed intelligently. The Bureau of Agricultural Economics keeps a watchful eye on growing crops, makes calculations as to probable yields, and issues reports thereon. The Marketing Administration gathers information on the market supply and demand conditions on cereals, fruits, vegetables, poultry and dairy products, and other farm commodities. It obtains this information at the large terminal markets, and at important receiving centers and shipping points. By wire, radio, newspapers, and mail this information is disseminated to all interested parties.

2. **FARM PRODUCE STANDARDS.** Since buyers in distant cities cannot visit farms and sample the products the farmer has to sell, it is necessary that standards be made uniform—that all interested parties use the same terms and specifications in grading farm products. To some extent this can be brought about by private arrangement or by state law; but only the national government has the constitutional authority and sufficient resources at its command to establish uniform standards for commodities sold in interstate and foreign commerce. The Marketing Administration arrives at its standards through co-operation with growers and buyers, and does not ordinarily make them obligatory until general voluntary acceptance of them has demonstrated their satisfactory character. Acts of Congress

¹⁷ *Ibid.*, p. 316.

¹⁸ *Ibid.*, pp. 295-298.

make the standards mandatory for grain, cotton, and certain other commodities when they are shipped in interstate or foreign commerce. An inspection service is maintained in the principal producing areas and receiving centers on fruits, vegetables, hay, beans, and other products. A permissive service is provided upon request for dairy and poultry products, rice, meats, wool, and canned fruits and vegetables. Mandatory and free inspection of tobacco is provided at those auction markets where a two-thirds majority of producers have voted for it. The inspection service passes upon huge quantities of food purchased for the armed forces of the United States, for shipment by the Red Cross, and for transfer to other countries under the Lend-Lease Act. It should be added that the Marketing Administration purchases the lend-lease farm products and delivers them to the representatives of the United Nations.

3. PROTECTION AGAINST FRAUD AND DISCRIMINATION. Several acts have been passed to protect the growers against unfair practices of buyers and of owners of warehouses. By an act of 1916 owners of warehouses storing farm produce entering interstate or foreign commerce are required to obtain licenses from the Secretary of Agriculture. He issues such licenses only to those who have adequate plants and who post satisfactory bonds. These "bonded warehouses" must treat all growers alike, accepting their goods on the same terms as long as storage space is available. Receipts for goods stored must be given on a specified form, and all commodities received must be graded by licensed inspectors employing the standards mentioned in 2 above.

A report from a commission merchant that produce reached its destination in bad condition, or was totally spoiled, is an old story with farmers. One farmer was even notified that his white sand had failed to stand the trip! By the terms of the Produce Agency Act of 1927 such merchants are forbidden to throw away, unless actually spoiled, perishable goods shipped in interstate commerce, or to make false reports of the conditions of such produce on arrival. An act of 1930 further strengthens federal control over marketing. Commission merchants, dealers, and brokers in perishable farm products must now obtain licenses from the Secretary of Agriculture. He may also revoke them for violations of the law. Holders of these permits must order their business in accordance with the details of the statute and keep complete records of all transactions. Upon complaint by an aggrieved producer, hearings are held and relief and damages awarded, if the complaint is well founded.

In marketing his livestock through the channels of interstate or foreign commerce, the farmer receives protection under the Packers and Stockyards Act of 1921. Packers risk severe penalties when they attempt price manipulation and certain other unfair practices. Owners of stockyards are also under supervision as to rates and practices. Although the official approval of the Secretary of Agriculture is needed for some of the actions

which are taken, the administration of these and similar acts is the responsibility of the Marketing Administration.

4. **REGULATION OF TRADING IN FUTURES.** The prices of agricultural commodities are often the subject of market speculation, to the disadvantage of the farmers. Take wheat, as a familiar example. An operator may agree to deliver 100,000 bushels to a miller six months later at a dollar a bushel. This is called "trading in futures." Now the operator hopes that the price of wheat will fall before the time for delivery; for his profit is measured by the decline in price from the time of the agreement to the date of delivery. Obviously, such traders thrive in a falling market and their manipulations will be to this end, the farmer being the chief loser. Back in 1916 Congress took a cautious step in the enactment of the Cotton Futures Act. It levies a tax of 2 cents per pound on all contracts for future deliveries of cotton, unless they stipulate the grade of cotton to be delivered. This measure could hardly be expected to limit speculation injurious to the farmer. The Grain Futures Act of 1922 went further. With the exception of producers' associations, all dealers in wheat, corn, and certain other grains, must operate under federal supervision and through "contract markets" designated by the Secretary of Agriculture. Such markets must be conducted by boards of trade acting under definite regulations; records must be kept open to federal inspection; measures must be taken to prevent price manipulation; and so on. A dealer on such exchanges who fails to comply with regulations may be deprived of the right to transact interstate business. The Secretary of Agriculture may close the entire market when its board acts unlawfully.¹⁹

Government efforts to improve farm prices. Despite all of the government services designed to help the farmer, his economic lot has not been enviable since 1921. Even in the happy days of general plenty immediately preceding the inauguration of President Hoover, the farmer failed to reap prosperity. During the campaign of 1928, it was rather commonly assumed that the government must do something out of the ordinary for him.

THE AGRICULTURAL MARKETING ACT (1929). In a move to relieve the farmer, Congress passed the Agricultural Marketing Act, which was designed to aid him in a big way and in new ways, particularly through a section aimed at the prevention and control of surplus products. The Federal Farm Board was established and charged with the duty of administering this and other sections of the act. Its most staggering task was to stabilize the prices of certain farm commodities. To accomplish this it set up stabilization corporations for cotton, grain, etc. These

¹⁹ The services of the Agricultural Marketing Administration are clearly stated in the *United States Government Manual*, Fall, 1942, pp. 298-301. An excellent discussion of the marketing aids supplied by the Government, although somewhat out of date, is found in C. A. and Wm. Beard, *op. cit.*, pp. 533-545.

corporations bought the farmer's surplus in an attempt to keep prices up. But with the general economic decline of 1930-32 the attempts at stabilization failed miserably.

THE AGRICULTURAL ADJUSTMENT ACT (1933). As the farmers had turned hopefully to President Hoover in the first month of his Administration and received the Agricultural Marketing Act with its new stabilization features, so they turned, still hopefully, to President Roosevelt for his plan of agricultural relief. He told the farmers, in effect, to agree upon a program and he would see that it was enacted into law. The result was a measure much more comprehensive and, frankly, much more in the nature of an experiment than the Hoover relief legislation. With farmers in the Middle West rioting because of mortgage foreclosures and tragically low prices for their products and with Senator Reed asserting that if the people of industrial Pennsylvania knew what the bill before Congress contained, "they'd riot in the streets," the bill became a law (May, 1933).

The plan was to raise the prices of wheat, corn, cotton, milk, and several other agricultural products to a point where they would bear a fair relationship to the prices the farmer had to pay for the goods he bought. Of course some standard had to be agreed upon, and the relationship between the price of farm commodities and the price of goods purchased by the farmer during the period of 1909-1914 was fixed as the standard. Applying the standard for a particular commodity, wheat, it was found that on the basis of what the farmer had to pay for his purchases in June, 1933, he should have 89 cents per bushel for his wheat in order to attain the pre-war "parity." Now in June, 1933, the farmer was getting 59 cents per bushel for his wheat. The price was 30 cents too low. How could this amount be found and turned over to him? The law provided that the Secretary of Agriculture might require processors (millers, etc.) to pay a tax on any basic farm commodity, such tax to be equal to "the difference between the current average farm price for the commodity and the fair exchange value of the commodity." Therefore, the Secretary could fix a tax of 30 cents per bushel on the milling or other processing of wheat, the revenue thus received being paid to wheat farmers who signed contracts with the Secretary to reduce their wheat acreage by 15 per cent.

Along with dollar revaluation, business recovery, and other influences, the agricultural adjustment program had its part in restoring the farmers' purchasing power to approximately what it had been in 1929. But, in January, 1936, the Supreme Court of the United States, in a six-to-three decision, declared the Adjustment Act unconstitutional. The main point of its objection to the act was that Congress had used its power to appropriate money for the purpose of regulating a subject reserved by the Constitution to the states.²⁰

THE SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT (1936). Even

²⁰ *United States v. Butler*, 297 U.S. 1 (1936).

before the invalidation of the first Agricultural Adjustment Act, those responsible for its administration had begun to place less emphasis on flat reductions in crop acreage and more on differential adjustments to the requirements of local and national conditions. Several acts, have been passed to accomplish what could not be done under the act of 1933. The first of these is the Soil Conservation and Domestic Allotment Act. This act contains important provisions on conservation, a subject on which Congress has undoubted power to legislate, and thus avoids the shoals on which the first adjustment act was wrecked. Incidentally, and this is the main point, the Conservation Act provides for the payment of rewards to farmers who voluntarily co-operate in the program of soil conservation. The bounties are sufficiently attractive to induce about one third of the farmers to co-operate. Soil conservation payments are made to farmers who divert a part of their land from such soil-depleting crops as corn, cotton, tobacco, and wheat to such soil-building crops as alfalfa, clover, and peas.

THE AGRICULTURAL ADJUSTMENT ACT (1938). This legislation puts in statutory form the "ever-normal granary" program which was championed by Vice President Wallace when he was Secretary of Agriculture. Under the provisions of this act, national acreage goals for basic crops are established; and as a means of stabilizing marketing, quotas may be used by the producers of essential crops, when approved by two thirds of the growers. Loans enable the farmers to carry over their surplus from the years of high production to be marketed in years of crop shortage. For 1942 the loans on basic crops were fixed at 85 per cent of parity. This act provides also for crop insurance on certain basic products such as wheat and cotton. Insured growers are guaranteed either 50 or 75 per cent of an average yield against losses caused by drought, flood, hail, wind, winterkill, fire, insects, plant disease, and other unavoidable hazards. Farmers holding about 80 per cent of the crop land of the nation co-operate in the new agricultural adjustment program.

The Sugar Act of 1937 authorizes payments to domestic sugarbeet and sugarcane growers who promote soil conservation, and meet requirements relative to minimum wages, the prohibition of child labor, and the marketing program. Working through state and local agricultural committees, the Agricultural Adjustment Agency administers these and other laws designed for the improvement of farm prices and agricultural conservation.

Aids for the underprivileged farmer. Although brief reference has been made above to Government loans to small farmers, the preceding pages relate almost entirely to the farmers who are in the economic class with business men, small and large. What of the farmer who, even in good times, barely manages to maintain an existence? What of the farmer driven from his farm by floods and droughts? What of the sharecropper,

and of the farm laborer? We do not like to think about them; they spoil the picture! But in recent years the government has planned for them and it has done something for them. The Emergency Relief Appropriation Act of 1935 created the Resettlement Administration. Now known as the Farm Security Administration, this agency, located in the Department of Agriculture, administers legislation enacted for the relief of underprivileged farmers and farm laborers.²¹

RURAL REHABILITATION. Approximately one million low-income farm families have been aided by loans to purchase farm and home supplies, even supplies for family subsistence. These loans are restricted to families unable to obtain operating credit at reasonable terms elsewhere. Standard borrowers (about 650,000) are given a farm and home management plan which explain home production and preservation of food and feed, crop rotation, soil-building, and other approved farm practices. The borrowers receive help from county farm and home management supervisors in working out their plans. Nonstandard borrowers (about half as numerous as the standard borrowers) receive loans to carry them through emergencies caused by drought or other disasters. Small grants may be made to poverty-stricken families for subsistence, medical care, and for sanitary facilities. In return for these grants the families do specified work on their farms or on public lands.

FARM DEBT ADJUSTMENT. Debt adjustment committees operating under the direction of the Farm Security Administration have brought farmers and creditors together in an effort to solve their mutual problems. Up to 1942 debts had been adjusted in 200,000 cases, with reductions amounting to some \$125,000,000. The debt adjustment committees have also made efforts to improve the tenure of tenant farmers by bringing landlords and tenants together to negotiate long-term and written leases. Four fifths of the tenants who have F.S.A. loans now have written leases with their landlords.

FARM TENANT AID. Under the terms of the Bankhead-Jones Farm Tenant Act (1937), loans to capable farm tenants, sharecroppers, and farm laborers are authorized for the purpose of enabling them to purchase family-type farms. Loans are made at 3 per cent interest and for periods not to exceed forty years. Funds are apportioned among the states on the basis of farm population and the prevalence of farm tenancy. About 30,000 families have been aided in this way.

MIGRATORY LABOR CAMPS. Unfortunately there is much truth to support the fiction in John Steinbeck's *Grapes of Wrath*. Tens of thousands of migrant families, many of whom once owned farms, have taken to the roads in search of work. Not only that, but a great deal of farm labor is needed only in harvest and sowing seasons; so that a considerable propor-

²¹ *United States Government Manual*, Fall, 1942, pp. 295-298.

tion of it is perforce migratory. The government has established more than ninety camps for migrant farm families. In them shelter, medical care, and sanitary facilities are provided sufficient for the needs of about 19,000 families at any one time.

RESETTLEMENT PROJECTS. These projects, some 150 of them, are designed for low-income farm families stranded on worn-out land. The government re-establishes such families on the resettlement projects and as they become self-supporting the residents buy the homes and lands they occupy. A number of these projects have already been transferred to private ownership. The total cost of the services rendered by the Farm Security Administration is small compared to that of other services to the farmer. Nevertheless, it has not received unqualified endorsement. It has even been ridiculed. It is a service for a class of people who "do not belong," who, in the minds of some citizens, hardly exist (which, to give existence a slightly different meaning, is almost true). They belong to the class of the dispossessed, the disinherited, and as such they are inarticulate, cannot press their claims. It is remarkable that the government has attempted to relieve their distress, and it is not surprising that the scientific and effective lobbyists who represent the great farm organizations, composed largely of relatively prosperous farmers, are not particularly threatening or menacing in urging the claims of the subsistence farmer, the sharecropper, the farm laborer, and the migrant farm families.²²

Agriculture and the war. The year 1941 almost completely changed the agricultural situation. The problems had been how to keep down production and keep up prices. Suddenly the problems were reversed, becoming how to keep up and increase production and keep down prices. On the production front, it may be said that the Department of Agriculture and the nation's farmers are doing fairly well. On the price front, there is some uncertainty. The issue here is complicated by the high wages that are paid to labor, the desire to get maximum production from the farmers, the power of farm and labor lobbies, particularly of the former, and the slowness of Congress and the Administration to awaken to the dangers of creeping inflation. At this writing there seems to be no doubt that the farmer will make substantial profit out of the war. It is hoped that he will not use it to buy land at high prices, as he did in the First World War, and then find that he is bankrupt at the end of the war. In any event, there is every assurance that the farm problem will again present itself soon after the conclusion of the present struggle.

State agricultural legislation. It would be quite erroneous to assume that the federal government is the only public agency which serves the farmer. While there had always been some agitation for federal encouragement to agriculture, the states took action first, and the increasing

²² Owen Stephens, "FSA Fights for Its Life," *Harpers'*, April, 1943, pp. 479-487.

federal activity in the interest of agriculture in recent years has not caused the states to withdraw from the field. It has rather encouraged the states to do more. At present, practically every state has an important executive department, or board, fully occupied with carrying out numerous statutes enacted for the primary purpose of benefiting the farmer. A great deal of this state effort is in co-operation with the federal agricultural agencies, and nearly all of it is of the same general character as the work carried on by those agencies. It is unnecessary, therefore, to enter into any extensive discussion of state agricultural legislation. A brief summary of the activities of one typical state on behalf of agriculture must suffice.

The Illinois Department of Agriculture has thirteen divisions, as follows: agricultural statistics, animal industry, apiary inspection, Chicago grain inspection, dairy husbandry, educational exhibits, East St. Louis grain inspection, foods and dairies, plant industry, poultry husbandry, markets, standards, and state fair. Statistical information concerning crops and live stock production is collected and distributed by the Illinois Department of Agriculture in co-operation with the Federal Department of that name. Working with the United States Bureau of Animal Husbandry the state bureau assists herd and flock owners in emergencies, disseminates information on the diseases of animals, promotes cattle testing, and in various other ways makes itself useful to stockmen of the state. The 30,000 beekeepers of the state are served by the division of apiary inspection, a division which is operated primarily for the eradication of the bee disease known as "American foulbrood." The division of foods and dairies administers the licensing law applicable to those industries engaged in various types of food business, and it is charged with the duty of enforcing the laws covering food products, concentrated feeding stuffs, fertilizers, cold storage plants, paints and oils, commission merchants, poultry dealers, egg dealers, and wood alcohol labeling. It battles the roadside sale of impure milk, destroys cream unfit for consumption, and stops live stock rackets at county fairs.

The division of plant industry co-operates with the United States Department in appropriate ways, and seeks to prevent the introduction into, and the dissemination within, the state of insect pests and plant diseases. It inspects all plant nurseries in the state, gives certificates to nurseries found to be free from harmful pests, abates infestation nuisances of plant pests, enforces the plant quarantine laws, and in other ways seeks to protect plant life. The poultry industry of Illinois is served by the division of that name. It lays particular stress upon its regulation of the Illinois Hatchery Plan, a plan designed to build a high standard for hatchery chicks and to serve as a protection to the farmer who purchases baby chicks. It assists the state institution farms with their poultry projects and promotes the "Illinois egg laying contest." The principal duties of the division of markets consist of enforcing the grading and packing fea-

tures of the state's standardization law; the administration of the agricultural co-operative act and the law governing the storage of grain; and providing shipping point inspection service on fruits and vegetables, and butter and egg grading services under State-Federal inspection agreements. No mention has been made of the work of several other divisions of the Illinois Department of Agriculture, but the summaries of the principal responsibilities and duties of those mentioned serve to indicate the wide variety of activities the state undertakes in the interest of agriculture and, to some extent, in the interest of the consumer.²³

II. CONSERVATION OF NATURAL RESOURCES ²⁴

The natural resources of the United States, as to variety, quantity, and quality, are not equaled by those of any other country. Formerly, we thought the supply would never be exhausted; that Mother Earth would replenish her treasures as fast as we took them from her. Not a few still seem to be guided by this faith. But the more intelligent, many of whom are in official places, belong to a "faithless" generation as far as natural resources are concerned. They believe that future (and futile) mourning over their loss can be avoided only by heroic measures of conservation in this generation. Only a brief treatment of this important subject of conservation is possible.

Land settlement. We started our national existence with untold acres of public land. Even now there are several hundred millions of acres of such land, and one of the important functions of the Department of the Interior is to administer the laws respecting it. Two of the pressing problems of the new nation were to get money with which to pay its debts and to get settlers on the land. The sale of public lands at very low prices brought in some revenue, and it was an important factor in the rapid economic and social development of the country; but it was not infrequently attended by the gravest scandals. Land speculation was very common, relatively perhaps as common as speculation in stocks a few years ago. Land companies bought and sold land, often tainting both transactions with fraud and corruption. In 1862 a new policy was introduced—land would be given away to homesteaders, one hundred sixty acres to go to any American citizen who would pay a small fee for the registration of his claim and do a little work on the land for a period of five years. Tens of millions of acres were taken up in this way, which resulted in placing many settlers in the territories. But speculators still had their innings,

²³ The summary is made from the *Illinois Blue Book*, 1935-1936, pp. 455 ff.

²⁴ C. A. and Wm. Beard, *op. cit.*, Ch. XVIII; E. G. Cheyney and T. Schantz-Hansen, *This is Our Land: The Story of Conservation in the United States* (1940); Malin, *The United States After the World War*, Ch. XIX; J. T. Young, *The New American Government and Its Work* (1933 ed.), Ch. XX; *Reports of the Secretary of Agriculture and of the Secretary of the Interior*.

securing lands from homesteaders, bona fide and often not, for less than their actual value. Despite the abuses, the system was largely justified; for it was certainly a speedy means of building our national empire.

Reclamation. When relatively little of the public land naturally suitable for agriculture remained, a policy of reclaiming desert land was instituted. There are millions of acres of such land in the United States. Some of it is very rich. All it needs is water. At first Congress encouraged irrigation projects by extending aid to the states and private concerns; but since 1902 it has authorized federal construction on the public domain, the government to be repaid from funds raised by the sale of lands, royalties from oil leases, and later, receipts from irrigation and power contracts. The Bureau of Reclamation, located in the Department of the Interior, has general charge of this service. Nearly 3,500,000 acres now receive water from government irrigation projects and the annual value of crops produced on these lands is about \$125,000,000. The Boulder Dam on the Colorado River supplies water to desert land, gives flood protection to Arizona and California areas, improves navigation, and brings needed water for domestic supply to the southern coastal plain of California. Its mighty harnessed waters generate electric energy, having an ultimate capacity of 1,322,000 kilowatts. The Grand Coulee and Bonneville projects on the Columbia River will eventually irrigate about 1,200,000 acres of land, and they are now furnishing considerable electric power.²⁵

When we consider irrigation, the question naturally comes to mind, Why should the government continue to reclaim land when, with the land now under cultivation, the farmer in normal times is able to produce much more than he is able to sell at a fair price? Irrigation frequently costs as much as \$150 per acre, sometimes \$200. Obviously, large benefits must be found before projects on such lands can be made to pay. Several of the projects constructed have practically failed, the settlers not being able to meet the very generous terms of their water contracts. But there is another angle to the problem. Some of the Western states must rely heavily upon irrigation. Should the central government be willing to risk a loss in order to develop their resources? The answer has often been "No," but very naturally it is not cheerfully accepted by the states concerned. Local agitation for irrigation will doubtless continue, and the federal government will probably grant concessions to local interests from time to time.

Then, too, irrigation does not stand by itself. Reference to the Boulder Dam and Grand Coulee projects brought out the fact that reclamation is only one phase of the great problem of conservation. Viewed broadly, as the National Resources Planning Board views it, the problem is to devise a plan which takes into consideration the "use of land, water, and other

²⁵ *Report of the Secretary of the Interior, 1941, pp. 1 ff.*

national resources, in their physical, social, governmental, and economic aspects." Thus viewed, an irrigation project which might not prove to be a good economic venture for the government might yet be desirable because of its social benefits.

Federal conservation. In opening the lands to settlers, a continent was conquered; but, as often happens in the case of a conquest, many valuable things were destroyed. Settlers and corporate concerns showed little or no appreciation of the value of the great forests, and cut them down for quick profits with no thought of reforestation. Mineral resources falling into private hands suffered the same sort of exploitation. The story could be considerably enlarged. A few wise men saw the folly of this from the beginning; many more saw it fifty years ago; a large body of the people see it now. Realization of this waste brought us to a policy of conservation. We adopted the policy tardily, and perhaps we do not pursue it now with the proper vigor; but it marks a great improvement over the old method of light-heartedly parting with the nation's birthright. Our public lands are now classified according to their character and content. Land which is primarily agricultural is still opened to settlers from time to time. Conservation is most evident in timber land, mineral resources, and power sites. Reclamation, discussed above, and soil erosion control, briefly mentioned in the last chapter, are forms of conservation.²⁶

1. **FOREST RESERVES.** In recent years, Congress has made considerable effort to conserve our timber resources. The almost wanton felling of trees threatened not only to exhaust our timber supply, optimistic declarations to the contrary notwithstanding, but also, since forests are great natural reservoirs absorbing the rainfall and releasing moisture gradually, to bring large areas into alternating periods of flood and drought. Of course, the greater part of the forest land was in private hands and Congress could do little to conserve it; but Congress authorized the President (1891) to set aside suitable portions of the federal lands as national forests. No one who has done any touring in the Western states needs to be told that this authority has been exercised in many localities. In 1911 Congress authorized the purchase of lands along navigable streams for federal forests, and a few years later authorized the purchase of other forest lands. Not among the least important acts of Franklin Roosevelt's first months as President were his orders directing the purchase of additional forest land east of the Mississippi and the enlistment of 275,000 men for forest conservation projects.

The Forest Service, formerly in the Department of the Interior but now in the Department of Agriculture, patrols of 176,000,000 acres of national forest, conducts experiments, lends aid and encouragement to the plant-

²⁶ Great national parks, such as Yellowstone and Glacier, also represent a form of conservation.

ing of trees, furnishes information on every phase of forestry, and, by placing expert advice and money at the disposal of the states, endeavors to secure their co-operation in forest conservation. A policy of economy would require that mature trees on the national reserves be sawed into lumber and that the government make some attempt to carry out such a policy; but the opposition from owners of private timber lands is often sufficient to stop activities on the government lands, the results being that trees on public lands grow to maturity and decay, while private owners are cutting their trees about four times as fast as they grow.²⁷ Yet it can be said that a growing number of Americans, including many of those responsible for the management of timber companies, are becoming conscious of the problem of forest conservation.

2. MINERALS. Just as the national government had freely parted with our timber lands prior to 1891, so it disposed of our mineral lands. The result in both cases was the same—prodigality, shameless waste. But since 1910, following the policy earlier initiated with respect to forests, the government has shown more disposition to conserve its mineral resources. No longer are mineral lands sold or given away. The government expressly reserves for itself the minerals under the soils which it sells for agricultural purposes. Mineral lands may be leased for mining by private companies; but such exploitation must be under government control and royalties must be paid into the national treasury. Whatever the merits of unhindered private ownership and development may be, Congress decreed by an act of 1920 that ownership of the public mineral lands should remain with the government. The Bureau of Mines, now back in its original Department, the Interior Department, performs most important functions for the government and the mining industry by conducting experiments and distributing information on various phases of mining. Since 1939 this Bureau has examined over 500 deposits of strategic materials in 29 states and has discovered new quantities of antimony, chromium, manganese, and tungsten ores.²⁸

Petroleum resources. The difficulties of preserving our natural resources are well illustrated by the reckless exploitation of the petroleum supply. Indeed, according to Harold L. Ickes, Secretary of the Interior, "compared with oil, we have been as frugal as a Scotsman in the management of our other natural resources."²⁹ Oil has been taken from the ground with little thought of future needs. Conservationists have warned that the supply is limited; that in 40, 50, or 60 years it will be seriously depleted. But oil kings have replied that when "such prophets of disaster as Pinchot and his faction" have died and are forgotten, there will be plenty of oil for our children's children. They also denounce the con-

²⁷ C. A. and Wm. Beard, *op. cit.*, p. 560.

²⁸ *United States Government Manual*, Fall, 1942, p. 264.

²⁹ In the *New York Times*, June 11, 1933, sec. 8, p. 1.

servationists for "hurting business." In normal times it is good business—good temporary business—to believe that the "cruse of oil will never fail"; for that belief justifies rapid exploitation. But nearly all of our reputable geologists tell us that this is a vain hope born of a burning desire for quick profits. Indeed, many petroleum refiners know that the oil resources in the United States, large as they are, are very definitely limited. Proof of this is found in the very active efforts made by officials of great oil companies to secure the backing of the government in their exploitations of foreign oil fields. But the public seems inclined to heed the oilman's cheerful prophecy of endless plenty.³⁰ Perhaps the Second World War is teaching us that our supplies of oil are not inexhaustible.

The oilmen in recent years have learned that too much oil can be produced. New gushing wells have flooded the market during depression years, bringing the price so low that wells have been operated at a loss. The wells in east Texas alone, flowing at full capacity, could now supply the nation's normal demand. With the great surplus (accompanied by much greater waste) created by the 400,000 wells in the country, it is not difficult to understand why oil has sold for 25 cents per barrel—in at least one case for as low as 4 cents. The representatives of this industry, the second in the land, have tried to reach agreements to limit production, but a minority group has always nullified such voluntary plans of co-operation. Some states have legislated, but this has failed because the oil industry is too big and powerful to be handled by the action of individual states. The President, the Secretary of the Interior, and Congress were asked to act in the spring of 1933. The result was that the oil industry received special attention in the National Recovery Act.

Among other powers given the President to regulate the industry was a very significant one authorizing him to prohibit the transportation in interstate and foreign commerce of petroleum and its products produced in excess of the amount permitted by state law. But the first New Deal legislation to receive the judicial veto was the oil control section of N.I.R.A. The Supreme Court held that the power to prohibit the shipment of "hot oil," which the oil control section gave the President, was a delegation of legislative power and therefore unconstitutional.³¹ Congress then passed another law. This time it delegated no authority, but went straight to the heart of the matter by prohibiting the shipment in interstate and foreign commerce oil produced in excess of the quotas permitted under state law. In April, 1942, the President designated the Secretary of the Interior as Petroleum Co-ordinator for War. The Secretary has wide power to deal with the production, refining, transportation, and marketing of petroleum, particularly where their functions relate to the war program.

³⁰ See J. Ise, *The United States Oil Policy* (1927).

³¹ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

3. **WATER POWER.** Federal control of water power has come to be a major issue in our time. Power sites have been taken up one after another by private concerns, and a hydroelectric power industry of colossal proportions has developed. Realizing that most of the power sites would presently be in private hands, Congress, in 1920, passed a comprehensive act relating to the use of water power on public lands and navigable streams and creating a Federal Power Commission composed of the Secretaries of Agriculture, the Interior, and War. An act of 1930 created a new commission with enlarged powers, its five members to be appointed by the President and the Senate. When hydroelectric construction, whether private or municipal, is proposed on a location within the scope of the Power Act, a license must be secured from the Commission, such license to run not more than fifty years. The Commission is empowered to regulate rates, services, and the issue of securities by companies so licensed, provided state regulatory bodies lack the necessary powers.

The authority of the Commission has been considerably widened by recent legislation. The Public Utility Act of 1935 gives it jurisdiction not only over water power projects on navigable streams or affecting interstate or foreign commerce, as previously provided, but also over the interstate movement of all electric energy. In other words, the Power Commission became a sort of interstate commerce commission for the regulation of rates and services of interstate electric power companies. The Natural Gas Act of 1938 extends the power of the Commission to that commodity as the act of 1935 extended to the Commission the authority to regulate electric energy moving in interstate commerce. The Commission is also given certain supervisory duties in respect to the administration of the Tennessee Valley Authority, Bonneville Dam, and Fort Peck Dam. The Commission now has the tremendous task of mobilizing the electric power of the United States to meet the demands of the war industries.

The Tennessee Valley Authority. During the First World War and in the years immediately following, the government spent \$165,000,000 for the construction of a dam and two nitrate plants at Muscle Shoals, on the Tennessee River. Constructed primarily for the war emergency, from 1919 to 1933 they seemed to be the government's white elephant. Various bids from private firms, including one from Henry Ford, were rejected. Senator Norris led a lonely and determined fight for government operation, and twice Congress enacted the legislation, but the idea of "the government in business" brought prompt vetoes from Presidents Coolidge and Hoover.

In May, 1933, the United States started, in the language of President Roosevelt, "the widest experiment ever conducted by a government"—a conservation project embracing a large river and its six principal tributaries, including parts of seven states, covering an area of 41,000 square miles, and touching the lives of about 2,500,000 people, more than two

thirds of whom are classified as rural. Roosevelt was hardly less enthusiastic for the project than Senator Norris, whom he congratulated as the "grandfather" of the Tennessee Valley Authority Act. Three administrators are designated to carry out its several purposes. Its main purposes are these: development of the Tennessee River for navigation, flood control, generation of electric power consistent with flood and navigation control, experimentation in the proper use of marginal lands, and reforestation development, all concentrated on "the economic and social well-being of the people living in said river basin."

To carry out its mandate to develop the Tennessee River for navigation and to obtain a maximum degree of flood control in the drainage areas of the Tennessee and the Mississippi, the Authority has constructed eight or ten dams on the Tennessee and its tributaries and has several others in process of construction. The Authority has given special attention to the production and distribution of electric power. In June, 1942, it had contracts to sell power wholesale to 128 municipalities, counties, and co-operatives, and 15 private utility companies. With the exception of the private companies, these agencies distribute the power to consumers at rates agreed upon with the Authority. The corporation (the T.V.A. is a corporation) and local governments and co-operatives have purchased the facilities of utility companies in a wide area at an aggregate price of \$116,000,000. The main purpose of the corporation is to supply electric energy at very low rates, which rates, it is hoped, will serve as a "yardstick" for other distributors of power. Another phase of the T.V.A. program is that of improving, increasing, and cheapening the production of fertilizer. In achieving this purpose, it has developed new and improved plant food products, the use of which has been incorporated in the agricultural programs of established agencies. Farmers using these fertilizers must readjust their methods in the interest of soil conservation, thus contributing to the battle against soil erosion and helping to build up adequate watersheds.

The statute creating the Authority requires it to hold its facilities available for national defense, and since 1940 the Authority has reoriented its entire program to aid in meeting the war needs. The corporation is now producing nitrate, an essential ingredient of high explosives; pure elemental phosphorus, a material of chemical warfare; and calcium carbide, needed in synthetic rubber production. In July, 1941, Congress appropriated a large sum to be used for installing new power-producing units. The Authority expects soon to have an installed capacity of 2,800,000 kilowatts, the greater part of which will be used for war production.³²

Other federal power projects. Twenty-eight power plants are operating under the Bureau of Reclamation. As of July, 1942, their installed capacity was nearly 1,500,000 kilowatts. Of this Boulder Dam produces

³² *United States Government Manual*, Fall, 1942, pp. 510 ff.

more than one half. The Columbia Basin Project, which includes Grand Coulee Dam and the Bonneville Dam, when installations are complete, will provide the largest power pool in the nation. All of these projects are now furnishing power for defense industries. Government power development has by no means received universal acclaim, but it has certainly come in handy for the war emergency, and it is possible that its usefulness at this time may strengthen public support for it in normal times.

State conservation. Supplementing the work of the national government and co-operating with it in a number of functions, the state conservation services are not insignificant. In a number of states, such services are gathered into a single department in accordance with the national plan of placing most of these functions in the Department of the Interior. In other states, they may be scattered among various boards and commissions. Whatever the organization may be, the administrators are charged with numerous duties and powers respecting irrigation, drainage, mineral resources, forests, fish and game, parks, and so on.

THE NORTH CAROLINA SYSTEM. A suitable example of a state conservation program is found in North Carolina. It has a Department of Conservation and Development, headed by a Director who is advised by a Board. For convenience of administration, the work of the Department is divided among several divisions. The Forestry Division is concerned with the 21,000,000 acres of land (most of it privately owned) in timber of some kind or best adapted to the growth of timber. Specifically, this service engages in the work of forest protection, including fire prevention, fire fighting, and the enlistment of "minute men" for the latter purpose; has charge of the forest nursery, from which it annually distributes to farmers at cost several hundred thousand seedlings for reforestation; administers the state parks and forests; and collects and distributes information on forest resources. For forest protection each state receives federal aid under the Clarke-McNary Act.

The Game Division protects the supply of bird and animal life and rehabilitates the wild life of the state by contributing to its increase. These functions it seeks to accomplish through education, the establishment of game refuges and sanctuaries, limiting the open seasons, and the like. The Division of Inland Fisheries is charged with the enforcement of laws applying primarily to sport fishermen, and the Commercial Fisheries Division with the enforcement of laws appropriate to its title. Both divisions co-operate with the United States Bureau of Fisheries in maintaining fish hatcheries.

The Water Resources Division makes surveys, keeps a close watch on power developments, gives special attention to future hydroelectric needs of the state, and co-operates with the Federal Power Commission, to mention only a few of its duties.

Certainly no less important than several other divisions named is the

Division of Mineral Resources, which conducts geological surveys, identifies samples of minerals sent in from any section of the state, and publishes scientific bulletins.

To aid commerce and industry generally, a division under that title was established. It makes business surveys in various industries, keeps in close contact with chambers of commerce, and co-operates with the Federal Bureau of Foreign and Domestic Commerce where practicable. Finally, the Division of Public Relations advertises the state, not brazenly or at great expense, but commonly through news articles and photographs which are printed in papers and journals without expense to the commonwealth.

Planning for conservation. Although Americans have had some experience with planning, especially in cities, we have been very slow to come to the realization that the best use of our national resources can be brought about only after careful studies of those resources have been made and plans for their development have been formulated and adopted. With this idea in mind the President, in 1934, established the National Resource Board. This agency, now a part of the Executive Office of the President and designated the National Resources Planning Board, has only advisory functions, but they are comprehensive. Its duties, among others are: to prepare and make available to the President, with recommendations, data and plans which may be helpful to a planned development and use of land, water, mineral, and other national resources, and such related subjects as may be referred to it by the President; (2) to co-operate with governmental agencies, federal, state, and local, and with any public or private planning or research agencies, in carrying out any of its duties; (3) to record all proposed federal projects involving the acquisition of land and land research projects and to provide the agencies concerned with information pertinent to the projects.

Planning boards or councils have been established by nearly all of the states, and some of these states have united in forming regional planning commissions. The idea of planning has even been adopted in some counties. State planning boards, largely through their full-time research staffs, have made studies and recommendations on such subjects as population and population trends, land-use, housing, water resources, fiscal policies, and governmental organization. The regional commission is concerned with planning for the larger area and with co-ordinating the efforts of the states in that area. An example of the sort of work such a commission may be expected to do is furnished by the Report of the Pacific Northwest Regional Planning Commission on the *Columbia Basin* (1935). The report gives a rather complete picture of the population, resources, and future possibilities of the four states (Washington, Oregon, Idaho, and Montana) in that region, and devotes special attention to the resources of the Columbia River and their possible uses.

Work of this type is done usually at the request of the President or the National Resources Planning Board. In any case, the Board keeps in close touch with all activities of this kind. One point which the Board constantly emphasizes is that the resources and needs of regions vary greatly and that, in consequence, programs for development should not be uniform. At the same time, it dwells upon the necessity for national planning, a planning system which takes into account not only the interests of particular areas but also the national interests as a whole. Regional rivalries, state rivalries, and even intrastate rivalries will make difficult the attainment of this very desirable objective.³³

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In 1942-1943, naturally enough, the Board directed its major efforts to war and post-war problems. Its comprehensive post-war plan is a most widely *unread* document, but the news of its existence was probably a last straw with Congress (usually opposed to planning) and that body terminated the activities of the Board as of June 30, 1943.

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Safety, Health, and Social Welfare



This chapter deals with a few functions of government which come very close to the life of the individual—public safety, public health, public morals, social security, and education.

I. PUBLIC SAFETY ¹

A number of functions might be included under the heading of public safety. The national government makes numerous safety regulations respecting passengers and employees of common carriers in interstate and foreign commerce, co-operates extensively and effectively with the states and mine operators in preventing mine disasters and in mine rescue work; makes large appropriations for flood prevention; and performs other services in the interest of public safety.² The states have many more safety regulations, applicable to commercial transportation, ordinary motor vehicle traffic, industrial establishments, and the like. The more important of these national and state measures have been considered in the previous chapters on commerce and labor. In this section the term "public safety" is given a more limited application, being restricted to police and fire protection. The state makes the general laws defining crime, leaves the city to enact minor regulations, and entrusts the city almost completely with the task of law enforcement within its limits. In the matter of fire protection, the state lays down only very general standards, leaving the city with even more responsibility than it has in police administration. Of course, rural communities have their problem of protection; but it is small in comparison to that which is presented to the cities. Consequently, this section deals almost exclusively with the latter.

¹ Federal Bureau of Investigation, *Standards in Police Training* (1939); E. H. Crosby and others, *Handbook of Fire Protection* (1936 ed.); A. F. Macdonald, *American City Government and Administration* (1941 ed.), Chs. XXXII-XXXIV; W. B. Munro, *Municipal Administration* (1934), Chs. XXIV-XXXI; National Commission on Law Observance and Enforcement, *Report on Police* (Report No. 14, 1931); *State Government*, March, 1934, "Aids to Justice" issue; J. M. Pfiffner, *Municipal Administration* (1940), Chs. VIII, IX, XIII; August Vollmer, *The Police and Modern Society* (1936).

² C. A. and Wm. Beard, *The American Leviathan* (1930), pp. 593 ff.

A. The Police System

Development of the police system. The great cities of the ancient world had fairly adequate police protection; but its almost complete absence in the medieval cities was one of the principal reasons why life in them was precarious. Indeed, the same lack of protection made the day unsafe and the night hideous in English cities until well into modern times. The only guardians of the law were the residents, who took turns walking the unlighted streets, perhaps whistling in futile attempts to hide their fear. Substantial citizens busy with their private affairs hired loafers and disabled men to take their turn as watchmen. In London, bellmen were chosen to supplement the watchmen; but they proved no more efficient. Both were the common subjects of jests, and rowdies often made them the victims of rough practical jokes. Crime flourished to such a degree that the London gentleman who had to be abroad at night took a guard with him. All this went on until 1839, when Robert Peel,³ the Home Secretary in the British Cabinet, persuaded Parliament to create a professional police system. Hooted and jeered, occasionally violently assaulted, the life of the early policemen was not pleasant; but it was not long until the high character of their work earned them the respect, even the affection, of the public.

Until after the middle of the nineteenth century, American cities attempted to preserve order in the old English way, and with as little success. A group of students, having taken their examinations and "out to make an evening of it," might conclude the celebrations by beating up "the watch." A legislative investigation of conditions in New York City led to the adoption, in 1844, of a police system after the new British model. As the New York force soon displayed greater energy in suppressing crime than the unorganized and undisciplined peace officers had shown, practically all of the larger cities followed the new model in the course of a few years.

Modern police organization. The police in a few of the large cities are under state control. This is not unreasonable, since the policemen are engaged chiefly in enforcing state laws. But the cities bear the cost, and they usually resent state "interference" in their affairs. Consequently, municipal authorities are allowed to direct the police in nearly all of the cities. A board or a single commissioner has general charge of the city's police. The commissioner method, because it offers less opportunity for political manipulations and provides full-time service and unity of command, is commonly employed. Commissioners are rarely appointed from the force, men of broader experience and more general qualifications being preferred. Lawyers, doctors, real estate men, bar-

³ Policemen were first called "Peelers" and "Bobbies," and later, because of their copper buttons, "coppers"—shortened to "cops" in America.

bers, bankers, undertakers, and others, are appointed to the post in rapid succession, two years being about the average tenure. The board or commissioner is charged with the broad duties of determining policy and organizing and managing the police force. In some cities the chief administrators must be guided by civil service rules in such matters as making appointments and promotions.

In immediate command of the police force is a chief of police, commonly selected from the force. Smaller cities usually do not feel the need of both commissioner and chief, and, in consequence, they frequently combine the functions of both officers in that of the chief of police. Attached to the headquarters of the chief are various inspectors, sergeants, and patrolmen. Stationed in precincts or districts are captains, with their lieutenants, sergeants, and patrolmen, each captain being a sort of chief in his district but very definitely responsible to the big chief at the central station. Large cities usually have intermediate units, divisions, one for every four or five precincts. The chief officer of a division is usually known as "inspector."

POLICE TRAINING. Formerly it was thought the policemen needed no special training. It was believed that physical strength and common sense, backed up by a club, a gun, and a pocket manual, made a patrolman. One commissioner explains how he fits recruits for their task: "I say to him that now he is a policeman, and I hope he will be a credit to the force. I tell him that he doesn't need anybody to tell him how to enforce the law; that all he needs to do is to go out on the street and keep his eyes open. I say 'You know the Ten Commandments, don't you? Well, if you know the Ten Commandments and you go out on your beat and you see somebody violating one of those Commandments, you can be sure that he is also violating some law.'"⁴ Such grossly inadequate "training" gives us policemen as unprepared for ordinary patrol duty as the inspector who gave it. Years ago the Europeans learned that policemen should be trained, and they provided facilities for such training; but only in the past thirty years have American cities responded to this crying need. Many cities still leave their officers to follow their common sense and the Ten Commandments, although some of these easy-going municipalities select their men under civil service rules. Other cities, not discounting the importance of common sense or a knowledge of the Commandments, select their recruits by competitive examinations, and then give them instruction in police powers and duties, elementary law, rules of evidence, legal procedure, first aid, the handling of prisoners, criminal identification, report writing, and other subjects. The very comprehensive three-year curriculum for policemen of Berkeley, California, has attracted the widest attention, and it is commonly rated as

⁴ Quoted in Macdonald, *op. cit.*, p. 467, from *Report of the Sub-Committee on Police to the Crime Commission of New York State*, p. 27.

the best in the country, certainly as one of the very few that really provides adequate training.

POLICE DUTIES. As the private soldier does the fighting for an army, so the patrolman is the principal law enforcer for the police department. He is on active duty eight hours a day, on reserve for another eight hours, and free the remaining time. On duty he may walk or use a motorcycle or an automobile, depending upon the character and length of his beat. He must cover his patrol within a certain designated time, keep his eyes open for violations of law, give particular attention to suspicious characters and disreputable places, and make arrests when necessary. Often a law is violated in such a trivial manner that an official warning accompanied by a smile is sufficient; another infraction may be of such a nature as to call for a stern reprimand; a third may be properly dealt with only by a prompt arrest. The patrolman is therefore a walking judge, handing out decisions in very minor cases and determining what cases are sufficiently grave to warrant regular legal prosecution. The patrolman must also serve as a sort of information bureau, report accidents, and carry out any special orders of his superiors. In recent years, traffic regulation has become a special police problem. Bells, lights, "one-way streets," and "no U turns" all help; but personal supervision is necessary. Patrolmen are detailed from the regular force for this work, often after special training for it. To the average citizen the traffic officer is now a more familiar figure than the patrolman.

Major crimes are commonly committed by experts. The trails they leave can be followed only by officers of the law whose skill at detection is equal to the professional criminals' art of concealment. Patrolmen who seem to have an aptitude for this highly scientific work of investigation and detection are sometimes detailed for it; but the selection of the detective force by special civil service tests should give a better qualified personnel. The latter method is now used in a number of cities. Whatever the method of selection may be, the necessity for special training for this service is now generally recognized. Despite efforts at improvement in recent years, we are still far behind the great European cities in the type of personnel attracted to the service, and, following somewhat logically from this, in the application of science to detection.

Criticism of the police system. The police force of a typical American city is grossly inefficient. Crime flourishes, and few arrests are made. "The American professional criminal," says Professor A. F. Macdonald, "soon learns that his occupation is fairly safe as well as highly lucrative."⁵ What is the reason for this? In 1931 the National Commission on Law Observance and Enforcement offered a number of reasons.⁶ They are worth reproducing at some length:

⁵ *Op. cit.*, p. 464.

⁶ Report No. 14, pp. 1-9.

(1) "The short and insecure term of office of the chief"—2.41 years in the great cities; "his control by the politicians whether linked in alliance with the criminals or not in his appointment and conduct of the office; his lack of independence; and frequently his incompetence for the place." No other city has such a fine record as Milwaukee for speedy detection, arrest, and trial of criminals. "The citizens there lay it to the fact that the city has had only two chiefs of police in 46 years and no control over the chief is ever attempted by the politicians."

(2) "The second outstanding evil of such poor police administration is the lack of competent, efficient, and honest patrolmen and subordinate officers. The latter are with rare exceptions selected or promoted from the rank and file of the patrolmen, possibly by reason of seniority, but more likely by direction of politicians whose private interests are to be subserved. Even where there are civil service examinations, the hand of the politician is all too plainly visible in such promotions." The patrolmen are selected "because of their partisan political activities or by civil service examinations, which can only remotely make certain of their qualifications for the discharge of their duties." Practically no effort is made to educate, train, and discipline them and to eliminate the incompetents. The patrolmen look to their political backers for retention and promotion in the service.

(3) "The lack of efficient communication systems whereby intelligence of the commission of a crime and descriptions of the criminals may be quickly spread over a wide territory. . . . The tools for the detection, pursuit, and arrest of the criminal should be better than the equipment of the criminal in his commission of the crime and escape from the scene of it." The need for faster automobiles and especially for teletype and radio is emphasized. "We venture to state . . . that, with perhaps two exceptions, not a single police force of cities above 300,000 population has an adequate communication system and equipment essential in these days to meet the criminal on even equal terms."

(4) "The well-known and oft proven alliance between criminals and corrupt politicians which controls, in part, at least, where it does not wholly do so, the police force of our large cities, might well be taken as a primary cause for police inefficiency, since it rules the head and every subordinate, and lays a paralyzing hand upon determined action against such major criminals."

(5) "The excessively rapid growth of our cities in the past half century, together with the incoming of so many millions of immigrants, ignorant of our language, laws, and customs, and necessarily adhering, in their racial segregation in large cities, to the language and customs of their native lands, has immeasurably increased the difficulties of the police in detecting crime among the foreign born." (Notice that the Commission states only that it is difficult to detect crime among the

foreign born. The charge commonly made that this element of the population is more given to crime than the native population is shown to be *false* by the same Commission in its tenth report, entitled "Crime and the Foreign Born.") For better detection of foreign born criminals, the Commission suggests more policemen of non-English speaking nationalities and a force of secret service officers known only to the chief and reporting only to him.

(6) Finally, the Commission reports that "there are too many duties cast upon each officer and patrolman. This is the outcome of the transition from rural or small-town policing to city communities." It recommends "segregations of patrolmen under designated officers who would have charge of prevention and detection of specific crimes."

State Police. The Texas Rangers, celebrated in song and story, were established by the Republic of Texas as a border patrol. Although as early as 1865 Massachusetts had a number of state constables, the idea of a state police system did not definitely take shape in any American state until 1905, Pennsylvania leading the way in that year. The reasons for the establishment of the "state constabulary" in Pennsylvania were the break-down of the sheriff-constable system in rural communities and the disturbed industrial conditions in the coal and iron regions. For somewhat similar reasons, fifteen or more other states, principally industrial states of the East, have established police forces. They are usually better trained, organized, directed, and disciplined than the city forces. They are usually unpopular with city police forces, out of jealousy perhaps, and labor hates and fears them because of their availability for service in strike areas. The principal function of the state police has been that of exercising general police authority in rural areas, supplementing the work of rural peace officers. The local officers are practically helpless in combating motorized crime, while the state police is equipped to apprehend the fast moving criminals. A few states even have "aircops." Other duties of the state officers consist of enforcing state statutes relating to fishing, hunting, fire prevention, gambling, and the like. It is said that the state police in some of the Eastern states have set a new standard in police administration and will acquire a larger significance in the future. With criminals recognizing no local boundaries and moving swiftly from one area to another, it seems very logical that the officers of detection should be no less free to ignore boundaries. The highway patrols with which the motorist is familiar are not ordinarily authorized to serve as general police. They are simply charged with the duty of enforcing the motor vehicle laws.⁷

The Federal Bureau of Investigation. Because it is national and efficient this Bureau is one of the most promising agencies of crime detection. It not only trains its own G-men, but in July, 1935, it established

⁷ Bruce Smith, "State Police," *State Government*, March 1934, pp. 51-54.

the National Police Academy to afford training to local and state law enforcement officers. The Academy does not "go out" for numbers, but insists that representatives selected to the training be carefully chosen. Its few hundred graduates have returned to their cities and trained perhaps 100,000 police officers. The F.B.I. maintains a laboratory in which may be made every type of examination—microscopic, chemical, etc.—which might lead to crime detection. Its identification division now contains more than 22,000,000 fingerprints. Not all of these are fingerprints of criminals, for many good citizens have sent their fingerprints to the division having in mind the possibility that they might be useful some day in establishing civil identification. Organized reporting of crime is an essential weapon in the war against organized crime. Since 1930 the Bureau has been collecting national police statistics, and at the present time cities in which more than half the population of the country resides co-operate in this service.

From the date of the passage of the Federal Kidnaping Act (1932) to 1941, the Bureau investigated 204 cases of kidnaping and solved all but two of them. During the same period, the Bureau investigated several thousand cases under the federal extortion statute and convictions were secured in 746 cases. Other statutes which the F.B.I. is active in enforcing include the Stolen Property Act, the Fugitive Felon Act, the Federal Bank Robbery Act, the White Slave Traffic Act, and the Selective Training and Service Act.⁸

B. Fire Protection

The importance of fire prevention. Fire losses in the United States amount to about a million dollars a day. Our per capita losses are much higher than those of any European country. Yet we have the best fire-fighting forces and equipment in the world. Our soldiers who were in the A.E.F. (1917-1918) often remarked that medium-sized French cities seemed to have no force or apparatus for fighting fires, while in American cities of the same size there was the daily drama of shrieking sirens, roaring motors loaded with equipment and firemen, and pedestrians scurrying to places of safety. Asked to state how much property he had seen destroyed by fire in France, the doughboy often admitted he had seen no fires. Now the French do have an occasional fire and they do have an organized system of fire fighting; but this is not their major line. Their efforts are concentrated upon *preventing* the occurrence of fires, rather than in fighting them. So well does this policy succeed in European countries generally that they have not felt the necessity of developing the firefighting art to the point of American efficiency. They are willing to concede that we are the champion fire-fighters of the world.

⁸ *Report of the Attorney General 1941*, pp. 177 ff.

How do the Europeans prevent fires? In the first place, lumber is so expensive that few persons want to erect frame buildings. In the second place, their laws prohibit frame structures in any areas where they will constitute a fire menace. And, in the third place, the use of fire in dwellings and places of business is thoroughly regulated by law. In recent decades American cities have seen the wisdom of fire prevention. Although they may still lay disproportionate emphasis upon fire-fighting, the matter of prevention has been seriously undertaken.

American methods of prevention. All of our large cities have rather elaborate regulations respecting fire prevention, and nearly all of the other cities have rules more or less suited to their needs. The rules commonly fix fire limits; that is, areas in which only buildings of a certain fire-resisting type may be constructed. There is a lot of talk about fire-proof buildings; but there is no such building. There are buildings which will not burn, but no buildings which will not crumble when subjected to high temperatures, temperatures that may be developed by neighboring buildings in conflagration. Hence, even the so-called fire-proof (actually only fire-resisting) buildings are not safe unless all buildings in the same area are constructed of noncombustible materials. Of course, some flexibility is provided for in the fire-prevention rules. Buildings such as theaters, in which a fire would likely cause loss of human life, may have no wood materials except for trimmings. Stores and shops are ordinarily allowed wood floors and partitions, but no other use of timber is permitted. Still more wood may be allowed in the structure of other buildings. It should be noted that these ordinances prescribing the type of building materials that may be used are not retroactive—they apply only for buildings to be erected; they do not require the demolition of structures standing at the time such ordinances are passed.

Equal in importance to the rules themselves is their enforcement. A staff of trained inspectors must be provided. Cities have commonly failed to engage a sufficiently large and competent staff. They have not always found honest men. It costs a little more to conform to the building material requirements, and it has been found that inspectors are sometimes lenient in this matter. Contractors who have good standing at the city hall know that the inspectors are not going to bother them overmuch. Then, too, the people who risk their lives in unsafe buildings are not particularly concerned about the enforcement of the fire-prevention ordinances. They are not sufficiently educated on the subject of fire prevention either to demand that fire ordinances be enforced or to refrain from acts of individual carelessness which often cause fires. Perhaps, after all, we Americans enjoy our fires.⁹

The fire department. Fire fighting will always be necessary; prevention will only lessen the need for it. Until around 1850, American cities

⁹ Macdonald, *op. cit.*, pp. 500-503.

relied upon volunteer fire brigades for this function. Boys about town who wanted some excitement or who saw fire fighting as an avenue of approach to politics were quite willing to "run," and they did it very well, although rival companies, arriving at a conflagration about the same time, occasionally fought each other and almost forgot the fire. All cities of any considerable size now have full-time, professional firemen. The chief of the fire department is commonly appointed by the mayor, and the other officers of the department are selected in about the same manner as police officers. The ordinary firemen are usually selected under civil service rules requiring competitive examinations. When appointed, they are given a little training, very little in some cities, and assigned to places as engineers and hosemen. The fire-fighting force, like the police force, is distributed over the city at conveniently located stations, a captain being in charge of each station. It may be of some interest to note here that, while an American city has fewer policemen than a European city of the same size, it has about twice as many firemen, and pays three times as much for fire protection.

FIRE-FIGHTING EQUIPMENT. Cities usually keep their fire-fighting equipment up to date. Horses and steam engines have given way to motors, and ladder trucks now have ladders of the quick-lifting aerial type. Chemical extinguishers are in use everywhere. Heavy streams of water are forced through turret pipes and deluge sets. High pressure systems are installed for the business districts, the pressure sometimes being as much as 300 pounds per square inch. Smoke helmets and gas masks enable firemen to go where they never went before and come out alive. Pulmotors enable them to resuscitate persons who have been overcome by smoke. Within three minutes after an alarm has sounded, a company is usually at the scene of the fire, a stream is turned on, and, says one chief, "in a few minutes the furniture goes floating out of the window."¹⁰ This remark indicates that in extinguishing a fire more damage may be done than is caused by the fire itself. Many fire-fighting units do not seem to be concerned about this, but the more progressive ones carry waterproof covers, brooms, mops, and so on, and do systematic salvage work.

Private fire protection. Factories, department stores, and other large commercial establishments do not rely solely upon the city for fire protection. They have their watchmen, who make the rounds and punch clocks to give proof that periodic inspection was actually made. Mechanical watchmen and fire extinguishers in the form of automatic sprinklers are usually installed, frequently under legal requirement. These are sealed with a substance which melts when a fire breaks out, thus releasing the water to deluge the affected area and to sound an alarm attached to the sprinkler-head. It is estimated that private per-

¹⁰ Quoted in Munro, *Municipal Government and Administration* (1923) Vol. II, p. 254.

sons and establishments pay about one third as much for fire protection as the cities spend on their fire departments.¹¹

II. PUBLIC HEALTH ¹²

Much more progress has been made in guarding society against disease than in protecting it from the violence of its own members and the ravages of fire. Advances in health protection are particularly noteworthy along the lines of prevention, the very lines on which our police and fire systems are weakest. All the governments—national, state, and local—play an important part in preserving the health of the people.

Federal protection of health. The right to engage in health activities is not one of the powers delegated to the national government, but that does not matter. Its powers to regulate foreign and interstate commerce, to operate a postal system, and to levy taxes and appropriate money are quite sufficient. In addition to maintaining numerous hospitals for its soldiers, sailors, ex-service men, sailors of the merchant marine, civilian government employees, and lepers, the federal government performs a number of other health services.

1. **QUARANTINE REGULATIONS.** The immigration officials see to it that diseased immigrants do not enter the United States; but disease may be carried by general passengers, crews, unsanitary ships and their accompanying pests, particularly rats, as well as by the lowly immigrant in the steerage. Congress has succeeded in lessening this danger by appropriate legislation. Any ship from a foreign port desiring to dock in an American port must procure from an American consul at the port from which it sailed a certificate attesting to its sanitary condition and the health of its crew and passengers. Upon arrival at quarantine, a ship is given another inspection by our domestic health officers before she is allowed to dock. It is clear, of course, that the authority of the national government to make and enforce regulations of the type described arises under its power over foreign commerce.

2. **THE PURE FOOD AND DRUGS ACTS.** The interstate commerce power has been still more useful in the hands of the national government in safeguarding the health of the public. It has not been used so much to restrict the travel of diseased persons between the states, but chiefly in respect to foods and drugs. In the latter part of the last century the

¹¹ *Ibid.*, pp. 255-256.

¹² C. A. and Wm. Beard, *op. cit.*, pp. 578-593; F. G. Bates and O. P. Field, *State Government*, (1939) pp. 347-356; Macdonald, *op. cit.*, Chs. XXXVI-XLII; Munro, *op. cit.*, XXII-XXIII, XXXIV-XLI; J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930), Ch. XV; W. G. Smillie, *Public Health Administration in the United States* (1935); J. M. Pfiffner, *Municipal Administration* (1940), Chs. XIV, XIX, XXII, XXVI; W. V. Reed and E. Ogg, *New Homes for Old*, (1940). United States Housing Authority (functions now taken over by the Federal Public Housing authority), various reports.

market was flooded with adulterated food, diseased meat, and all kinds of remedies guaranteed to cure any kind of disease. The people were not only the victims of deception, but many of the products sold them were very injurious to health. In response to what amounted almost to a popular uprising, Congress enacted the Food and Drugs Act and the Meat Inspection Act in 1906.¹³ Despite the strenuous opposition of business most affected by these laws and the lingering resentment a few individuals still bear toward the government for its efforts to protect them from stimulating "cure-alls" concocted by their favorite quack, mail-order doctors, the food and drug laws are rated among the most beneficial statutes of the past fifty years. They close the channels of interstate and foreign commerce to unhealthful, adulterated, or misbranded foods, meat, beverages, and drugs. Specifically, the Meat Inspection Act, administered by the Department of Agriculture, requires approval by federal officers of all slaughterhouses preparing meat for interstate trade; the inspection of animals before slaughter; and the inspection of meat for packing or canning.

With respect to other foods, the Food and Drugs Act prohibits such practices as the use of harmful preservatives, the adulteration of a food, unless the label faithfully reveals such adulteration, and the selling of one product under the name of another. The same rules apply to beverages. As for drugs, those medicines which contain such ingredients as alcohol and laudanum must have the percentage indicated on the label. Other drugs must conform to standards recognized by the *United States Pharmacopoeia*, that is, the directory of medical chemicals. The reader is aware that not everything that can be purchased at a drug store is a drug. For example, cosmetics are not, at least not within the meaning of the act under discussion; for they are not "intended to be used for the cure, mitigation, or prevention of disease of man or animals." Thus it happens that cosmetics with acid content may still be sold in interstate trade, despite the occasional tragedies attending their use. Lotions containing wood alcohol, which may cause blindness, and mercury of lead, which may produce inflammation, making an entrance for bacteria into the system, are still legally available in great quantities to beauty seekers. It is true that under the Wheeler-Lea Act of 1938 advertisers of drugs, cosmetics, and certain other products must be careful about the claims they make for the "wonder-worker" they have to offer, but the act does not prevent an individual from purchasing poison.¹⁴

The problem of their enforcement. While the pure food and drugs laws have been justly criticized for not being sufficiently wide in scope and for prescribing penalties so light that some concerns are willing to pay

¹³ In the following discussion the writer has relied rather heavily upon J. T. Young, *The New American Government and Its Work* (1933 ed.), pp. 336 ff.

¹⁴ *Report of Federal Trade Commission* 1942, pp. 32, 34, 42-44.

the fines as a license for doing illegitimate business, the chief criticism is directed, not at the shortcomings of the laws, but at the manner in which they have been administered. This task has been entrusted to the Food and Drug Administration which, until 1933 at least, was primarily concerned not so much with prosecuting violators of the laws as with bringing manufacturers into a harmonious understanding respecting the standards of products. The importance of this line of approach should not be minimized, but there was frequent complaint that it was followed so extensively that the punitive provisions of the statutes were too often neglected. It was further charged that there was not enough large-scale sampling of the annual twenty-billion-dollar output of the food and drug industries and that the Food and Drug Administration had not been furnished with a sufficient number of inspectors for this important work.¹⁵ Strengthened by an act of 1934 and now functioning as a unit of the Social Security Agency, the Administration appears to be making the most of its possibilities at this time.

3. THE CASE OF PHOSPHORUS MATCHES. What can Congress do to protect the health of individuals against menacing articles not in interstate or foreign commerce? The use of phosphorus in the making of matches was long known to be a standing peril to the workers, often inflicting upon them the hideous and frequently deadly "phossy jaw." The states did not take adequate measures and an appeal was made to Congress. Manufacturing not being commerce, Congress found its taxing power handy in this case. It imposed a prohibitive tax upon white phosphorus matches, thus stopping their manufacture. As we have seen, there is a limit to what Congress can do under its commerce and taxing powers; but they may both be used within constitutional limitations to regulate matters not directly placed under the control of Congress.

4. THE PUBLIC HEALTH SERVICE. The few laws briefly outlined above by no means indicate the breadth of federal activities in making and keeping the nation healthy. A broader view of these activities may be gained by taking a few samples from the work of the Public Health Service, formerly located in the Treasury Department, but now with the Social Security Agency.

(1) It seeks through the inspection of ships and airplanes to prevent the introduction of diseases from abroad. In furtherance of this same purpose, its medical officers in foreign countries examine aliens applying for immigration visas and medical officers at our ports of entry again examine aliens seeking entrance to the United States.

(2) The prevention of the spread of infectious diseases in interstate

¹⁵ See A. Kallet and F. J. Schlink, *100,000,000 Guinea Pigs* (1933). This is an interesting book. The titles of some of its chapters are: "A Steady Diet of Arsenic and Lead"; "Prescriptions, Magic, and Poisons"; "Danger in Cosmetics"; "The Quack and the Dead"; and "Little White Lies."

traffic is sought through the certification of sources of drinking water used on railroads, buses, vessels, and airplanes, through co-operation with state authorities in eradicating contagious diseases and in setting up county health units, and through such educational activities as National Negro Health Week programs.

(3) The Health Service co-operates with scores of other government agencies, national, state, and local, in such matters as milk sanitation, malaria control, the prevention of phosphorous poisoning, vaccination against Rocky Mountain spotted fever, public health nursing, tuberculosis surveys, and studies of the health of anthracite coal miners. There is also considerable co-operation with private health agencies, particularly with those engaged in research.

(4) Scientific research in the Health Service includes investigations of cancer (at the Harvard Medical School), heart disease, leprosy (at Honolulu), malaria, Rocky Mountain spotted fever, relapsing fever, tick-host anemia, child hygiene, industrial hygiene and sanitation, and stream pollution.

The protection of health is one phase of the new social security program. Title VI of the act which provides for that program authorizes annual appropriations (1) for assistance to the states, and other health districts in establishing and maintaining public health services and (2) for the investigation of nationally important problems of disease and sanitation. An annual appropriation of \$11,000,000 is now made to carry out these purposes. Particularly noteworthy is the progress of the co-operative work in dealing with venereal diseases.

The public health work is usually done very quietly and very efficiently. The war against disease which goes on constantly at a relatively low cost and without loud patriotic appeals to do this or that is nevertheless a war, a war in which strategy must be used against the hidden enemies of the human race and in which strategy must sometimes be used to convince the race that it has so many invisible enemies. There are still many individuals in our own country who, in effect, insist upon their right to have a disease (and, of course, upon their right to pass it on to their neighbors). Not the least of the tasks of the public health officers is that of persuading the public to accept for its own benefit certain health services.

State protection of health. Although the protection of health has always been a state function, until some sixty years ago the states did very little in this direction because scientific knowledge upon which to base action was quite limited. But since the days of our grandparents medical science has advanced rapidly, and the great majority of the states have taken positive measures to secure some of its benefits for the public. The entrance of the national government into this field in a large way a generation ago has not caused the states to withdraw from it. On the

contrary, it has stimulated state activity. Besides, the health functions of the two governments are complementary rather than overlapping.

1. ORGANIZATION OF STATE AGENCIES. What have the states done? They have established state boards of health, often giving them the power to issue important orders and regulations for the purpose of carrying into effect general statutes relative to the public health, and always giving them the authority to investigate health conditions and to supervise the work of subordinate health officers. Not infrequently a state board of health is given a considerable degree of control over local agencies. Of course a board cannot carry on the routine work of health protection. This is done by administrative officials and employees, subject to the general supervision of the board. The executive head of the administrative forces has some such title as "state health officer" or "director of public health." The administrative services of the typical department of health are divided into appropriate bureaus, with doctors, chemists, engineers, and other scientists and technicians assigned to each according to the need. It should be stated here that not all the public health functions are monopolized by the department of that name. Departments of agriculture, education, social security, or other administrative agencies, usually have a good share.

2. FUNCTIONS OF STATE AGENCIES. Space permits only a partial enumeration of the functions of the health agencies.¹⁶

(1) The collection of vital statistics and the assembling of other information contributing to a knowledge of health conditions and trends.

(2) A very old service is that of quarantine, the compulsory isolation of persons with contagious diseases.

(3) Hygienic laboratories are commonly maintained for the purpose of making bacteriological examinations of various kinds.

(4) Hospitals are established for the care of persons unable to pay for private treatment, a number of states making special efforts to provide treatment for the tuberculous.

(5) The administration of the vaccination laws and the distribution of vaccines are other important functions.

(6) The medical examination of school children is now a general and splendid service, often leading to correction of defects which if undiscovered until later life might not yield to treatment.

(7) Some states maintain a bureau of child hygiene, which reaches the preschool child, giving physical and mental examinations, advising parents, and so on.

(8) Still another service comes in the enforcement of laws relative to sewage disposal and water supplies.

(9) Inspections of factories, canneries, packing plants, and similar es-

¹⁶ For a fuller discussion see Bates and Field, *op. cit.*, pp. 331 ff.

tablishments are health functions with respect to employees, or the public, or both.

(10) The enforcement of state food and drug acts may be crowded in as a tenth but nevertheless a very important duty of the health administration.

(11) The final reference is to the most fundamental health service, which is that of educating the public in elementary health precautions, a program which many states have carried forward in a very satisfactory manner, the schools serving as the principal media.

Licensing professions and trades affecting the public health. In addition to the types of services mentioned, the states regulate the practice of professions and trades which touch the public health. This is done chiefly by examining applicants and licensing those of good character and demonstrated competence and by the revocation of licenses for cause. Subject to such regulations are physicians, surgeons, drugless practitioners, dentists, optometrists, chiropractors, chiropodists, osteopaths, pharmacists, veterinarians, embalmers, plumbers, barbers, hairdressers, cosmeticians, electrologists, manicurists, permanent wave operators, and others. The fitness of a person to practice any particular profession or trade of the type named is determined by a state board of examiners chosen from the list of established practitioners.

County health administration. For very much the same reason as the states, counties were slow to take measures to guard the public health. At the present time counties lag behind other government units in health protection, owing in large part perhaps to the mistaken notion that rural inhabitants will be healthy without public efforts to that end. Nevertheless, the counties are making some progress. Nearly all of them have a board of health or other officers serving in that capacity. Such boards are commonly authorized to make and enforce regulations to safeguard health, to cause the abatement of nuisances and unsanitary conditions, and to take such action as is necessary to prevent the introduction and spread of contagious diseases. Ordinarily, a board is empowered to appoint a county health officer, who may have various duties, such as investigating nuisances to health, inspecting food, water, and milk, and administering the laws applicable to contagious diseases. In several states, county nurses are now appointed to assist in general health work, but not to serve as nurses in individual cases. The county hospital is a familiar institution. There are some five hundred of them—the greater number for the indigent sick, but some are for special diseases such as tuberculosis.

In its health functions, as in most others, the county is acting primarily as an agent of the state, and it is therefore commonly subject to rather close state supervision and direction, especially in those states which ap-

propriate funds for county health work. A problem of health administration which has not been completely worked out is that of the relation of the city and county authorities. A number of states solve it by limiting the jurisdiction of the county officers to the rural areas and small towns; but some others follow the plan of combining or securing close co-operation between county and city agencies, a plan generally considered quite feasible, particularly if the city population does not exceed 50,000.¹⁷

City health services. The cities are now very much alive to their responsibilities respecting the health of their inhabitants. The states fix the health standards that municipalities must attain, and they ordinarily exercise sufficient control to make sure that the standards are maintained; but many cities go far beyond the standards required by state law and, in addition, include functions not mentioned in the law.

1. ADMINISTRATIVE ORGANIZATION. Many cities still have boards of health for general supervisory purposes; but a number of authorities feel that the board of health is unnecessary and sometimes in the way—that, in any case, regular administrative officers, who are quite competent to take over the duties of the board, must be employed. Whether a city makes use of a board or not, a health officer is in direct charge of the administrative activities. In large cities, the department of health is divided into several divisions or bureaus, each charged with particular functions and having assigned to it the necessary physicians, laboratory experts, inspectors, and other specialists.

2. FUNCTIONS. With certain exceptions, the work of the city's health forces is similar to that performed by state agencies. Of course, city authorities have no subordinate agencies to supervise, and they must intensify some activities which do not engage the major attention of state authorities and add a few which concern those authorities only incidentally. Working in congested areas, city authorities must be most vigilant for communicable diseases, quick to impose quarantines when such diseases are found or reported, and careful to disinfect the premises when an illness has terminated. Eternal vigilance is one of the prices of a city's pure milk supply. Used by practically everyone and an especially fine food for children, milk and its products are unfortunately very easily subject to contamination and therefore often bring disease and death. Many cities have the most stringent regulations respecting the testing and quality of milk sold to their inhabitants. Samples of milk are constantly being taken from wagons on the streets and tested in the laboratories. Inspection of the dairies which ship milk to the city is also a regular proceeding.

The "smoke nuisance" is entirely a city problem. It is not, as a student once told the writer, the problem of preventing individuals from

¹⁷ Fairlie and Kneier, *op. cit.*, Ch. XV.

smoking tobacco, but the problem of forcing manufacturers and others having smokestacks belching forth clouds of ugly, dirty smoke, often laden with poisonous gases, to abate that nuisance. Many cities have successfully met the situation by requiring all large users of soft coal to install smoke consumers. Other regulations and activities of city health authorities, being of a character similar to those mentioned under state and county health functions, are omitted from this discussion.¹⁸

Some problems vitally connected with health. Practically every city has problems vitally connected with health which are administered by other than health departments, or by health and other authorities combined. Among these may be mentioned housing, sanitation, water supply, and recreation. The health phases of these services are fundamental, and they are here treated to the practical exclusion of the others.

HOUSING. Housing conditions in nearly all of our large cities and in some of the small industrial cities and towns have for years amounted almost to a national scandal. Lacking sufficient light, air, living space, and toilet facilities, living in crowded rooms, or a room, often with a lodger or two to help piece out an existence, the unskilled worker's family has a hard and not infrequently losing fight against disease and moral deterioration. Some would lay all the blame on the shiftlessness of the laborer and dismiss the subject. No doubt some of the fault lies there; but city governments have generally recognized that not all the circumstances are under his control, and consequently have come to his aid with housing regulations, some cities with elaborate ones. These codes contain a number of provisions respecting such matters as building materials, fire escapes, and stairs—provisions designed to lessen the fire hazard. But requirements respecting light, air and sanitation—predominantly health regulations—are treated even more extensively. Such regulations limit the amount of lot space a building may occupy; state the minimum requirements for floor space and windows; and prescribe the minimum standards for water, toilet facilities, drainage, and so on. Often the regulations are meager enough, as instanced by the requirement that there shall be running water on every floor, accessible to every family; but they do afford some protection to tenants. The laws are also designed to bring the tenants up to certain standards. For example, the keeping of poultry and swine in tenements is prohibited. "They kept the pig in the parlor" was found to be very near a reality, not just the words of a song.¹⁹

Promotion of housing. The difficulties involved in devising just the right sort of legal regulations and enforcing them have caused many authorities to approach the housing problem from another angle, the angle

¹⁸ For fuller discussion, see Munro, *Municipal Administration*, Chs. XXXIV-XXXVI; Macdonald, *op. cit.*, Ch. XXXIX.

¹⁹ Macdonald, *op. cit.*, pp. 568 ff.

of promotion. This phase of housing was by no means lost sight of in the President's Conference on Home Building and Home Ownership (1931). This Conference published eleven volumes of reports which constitute the most comprehensive publication yet made in housing science. To date not a great deal has been done to promote housing. Certain private corporations in New York, Newark, Chicago, and a few other cities have erected tenements which are let to workers at reasonable rates but relatively few families are accommodated and the rent is still above what the unskilled wage-earners are able to pay. Many European cities have adopted the scheme of municipal housing; but, with the present state of political control in practically all branches of American city government, authorities generally issue warning against the undertaking on this side of the Atlantic. As an encouragement for the erection of model apartments, New York grants tax exemption on those which do not rent for more than \$11 per month. A few housing organizations have constructed tenements under this law. Another means of aiding housing is through cheap government credit. This is common in European countries, but until recently the idea made but little headway in our own.

FEDERAL HOUSING PROJECTS. Since 1932 the federal government has taken a very active interest in housing development, this being one of several problems that that government, almost ignoring the states, has approached through direct relationship with the cities. In 1932 Congress authorized the R.F.C. "to make loans to corporations formed wholly for the purpose of providing housing for families of low income, or for reconstruction of slum areas, which are regulated by state or municipal law as to rents, charges, capital structure, rate of return, and areas and methods of operation," provided such undertakings were self-liquidating in character. This was something new. Then came the New Deal with its National Industrial Recovery Act, under Title II of which loans were offered to private housing corporations and federal administrative authorities were authorized to undertake public housing projects. Later, additional appropriations were made for the same purposes. The Housing Division of the Public Works Administration assisted several limited-dividend corporations with the financing of housing projects and it let contracts for work on approximately fifty public housing enterprises. Federal housing construction was slowed up, however, by some legal tangles, including a district court decision denying the government the authority to condemn land for slum clearance.

The national public housing program really got under way with the passage of the Housing Act of 1937. This legislation leaves the state and municipal authorities the initiative, but it provides for federal loans and subsidies for low-rent housing and slum clearance programs. The local authority submits plans for construction to the national authority, and if such plans meet the federal requirement that cost shall not exceed a

stipulated sum (\$4,000 per family unit in all except the large cities), the federal government will make loans, at low rates of interest, covering 90 per cent of the cost. The federal government also makes outright grants for the construction of low-rent units to be occupied by families who would be otherwise obliged to live in the slums. The federal housing program is tied up with slum clearance, the standard plan (to which exceptions are permitted) being that for each modern unit constructed a slum unit must be demolished. Such projects cost a great deal of money in large cities, where slum dwellings may stand on land valued at four or five dollars per square foot. Not a few housing authorities suggest that new construction be undertaken in areas where land is less costly, and that slum clearance be retarded for the time being.

The states having large urban communities were almost unanimous in permitting them to engage in public housing under the federal plan. Nearly three hundred cities have taken advantage of this privilege, and the Federal Public Housing Authority has approved more than that number of housing projects, costing well over \$500,000,000.²⁰ Of course this program has been suspended as a result of the war. In the areas of war industry, projects already completed are being used to house war workers, and those under construction are being rushed to completion for the same purpose. The Federal Public Housing Authority is also feverishly pushing construction in war areas in which none had been planned before and in which the need will practically cease to exist when the emergency has passed.²¹

SANITATION. A few centuries ago, the pedestrian picking his way down a slimy street was much less on the lookout for street traffic than for dishwater and similar refuse that might be thrown at any time from a window or door of a city dwelling. Rubbish and garbage also took their places in gutters, and swine and dogs came to help themselves. Occasionally, a good rain would come and sweep some of the noisome mess out of the city. Sewage disposal was almost as primitive. One of the chief reasons for the good health record of modern cities is found in their progress in sanitation, in the collection and removal of wastes under the direction of sanitary engineers. It must be said, however, that sanitation is more than a branch of public health; a great deal of it, the removal of ashes and rubbish, for example, simply contributes to public convenience.

Garbage would probably be a menace to public health, and unquestionably a nuisance, if not properly disposed of. It is ordinarily collected by city employees, but sometimes by private contractors. It is disposed of in various ways, a number of which are quite satisfactory. These are: towing it to sea, if far enough out; feeding it to hogs; burning it; or reducing it, that is, cooking the grease out to be used for such pur-

²⁰ Macdonald, *op. cit.*, pp. 572-573.

²¹ *United States Government Manual*, Fall, 1942, p. 124.

poses as the manufacture of soap. The residue makes a good fertilizer base.

Quick and effective collection and disposal of sewage is absolutely essential to the public health. A soldier in the front line or even in no man's land is in less danger than his civilian brother would be in a city without a sewage system. Every city must have this type of subway service, and the spent water supply, carrying human, household, and industrial wastes, must be kept moving to avoid trouble. In large cities, the trunk mains are six or eight feet in diameter. Not the least of the marvelous things in Paris is its sewage system, its great horseshoe-shaped main tunnels being from fifteen to twenty feet in diameter. The sewage flows in a trough beneath a projecting footpath, and above this path there are galleries which carry the city water mains, electric lighting, telegraph, and telephone wires, pneumatic postal tubes, and pipes containing compressed air to be used as power. A properly identified visitor may have an instructive and entirely pleasant motor boat trip through the mains in company with the inspector.

Cities dispose of their sewage in various ways. Those near the sea run their sewage into it, at a point several miles from land to avoid polluting the beach. A number of cities on the Great Lakes empty their sewage into them; cities on rivers usually make use of them, the Mississippi getting about two billion gallons a day. Sufficient water renders the sewage harmless. Cities not having this natural means for disposal must take care of their sewage by filtering or other processes.²²

WATER SUPPLY. Every city must have an abundant supply of water. It is essential to safety, convenience, and health. Ancient Rome was well supplied through her great aqueducts. The inhabitants of medieval cities used but little, and that was often impure, coming chiefly from rivers and wells. The modern city gets its water from various sources—springs, lakes, rivers, and mountains. Water unfit for use in the condition the city finds it, is carried through water-treatment plants, where it is filtered, chlorinized, or given other treatment necessary to make it harmless.²³ A few still prefer the "cold, pure, wholesome water" from the farmhouse well (which may be located in a little valley with the pigpen on one side and the stable on the other), but people of moderate intelligence know that the health risk as between it and city water is easily ten to one.

RECREATION. Realizing that recreation facilities are essential to the physical and mental health of both young and old, every city has made some provision for them. Young people must play in order to use up surplus energy, and if the opportunity for play is not given, they often get into mischief and land in the juvenile court. They are likely to

²² Munro, *Municipal Administration*, Chs. XXII, XXIII; Pfiffner, *op. cit.*, pp. 453-463.

²³ Munro, *op. cit.*, Ch. XLI; Pfiffner, *op. cit.*, pp. 463-470.

make mischief of their play occasionally, if it is unsupervised. Progressive cities, therefore, not only provide large playgrounds in every section where there are a few hundred children, but they engage playground supervisors as well. Many cities furnish inadequate playgrounds and maintain no supervision over them. The value of economy is not underestimated, but there is some doubt as to the wisdom of this particular economy. Parks are places of recreation and play for all classes and ages. A few decades ago one might see in a park a sign, "five dollars fine for walking on the grass." Fortunately, we have learned that parks are made for the people, not the people for the parks. While all of the cities have parks, only a small proportion of them have park systems—parks of different types, in the different sections of the city, or even outside, connected with tree-lined boulevards. Although we might wish that more cities would turn their attention to the need for additional playground facilities and more enlightened planning for parks, there is no great reason for discouragement, considering what has been accomplished in these directions in recent decades. During the depression years, however, shortsighted economy cut very heavily into the recreational program in some cities.

Need for continued improvement of public health services. Although great progress has been made in public health activities during the past fifty years, it cannot be said that all that science has to offer has been utilized in this domain. Government authorities, particularly state and county authorities, are slow to accept the demonstrated facts of medical science and they are reluctant to appropriate funds with which experts may wage the battle against disease. Furthermore, powerful business interests impelled by greed have often opposed the most desirable health regulations. But it must be said for such interests that they are usually quick to see the advantage they gain through public confidence in their products once the regulatory laws have been enacted. As for improvements we might hope to see in public health administration in the near future, the following are suggested: an enlargement of the scope of the federal pure food and drug laws; increased activities of the states along the same lines and more state attention to the general problem of public health; vastly increased public health work under state supervision in local governments, particularly in counties and subdivisions thereof. In times of stress it is more necessary than ever that governments give attention to the physical well-being of citizens. "Economies" in public health administration may prove very costly within five or ten years. In 1944 it is encouraging to find that the national government takes a long-time view of its obligations in respect to health protection. It is especially active in co-operating with state and local health agencies in the teeming war industry areas.

III. PUBLIC MORALS ²⁴

We now come to deal briefly with a topic upon practically every phase of which there is strong disagreement; around which sentiment, tradition, prejudice, and religion form strange alliances and wage deadly combats. One man knows he is right and he wants his convictions expressed in a rule of law for all. The gentleman who takes a diametrically opposite view wants his law. A third man—some would call him non-moral—wishes they would both “mind their own business” and leave the public alone. But as long as human nature is what it is, agitation on moral questions will probably continue. A few of these questions are discussed here. Perhaps they are not all moral questions *per se*; but moral considerations have always entered strongly into the debate, making them moral questions for the purposes of this discussion.

Federal regulation. The power of the national government to put morals on a statutory basis comes primarily from its commerce, postal, and taxing powers and, for a time, from the Eighteenth Amendment. Reserving this Amendment for the moment, let us take a few samples of what has been done under other authority.

1. GENERAL. From the mails are excluded lottery tickets, obscene or indecent writings or pictures, contraceptive information or devices, matter designed to promote frauds and swindles, “literature” tending to incite crime, prize fight films, and certain other matter. Persons denied the use of the mail would naturally turn to other means of communication; but Congress has blocked these channels also, using its commerce power.

Considerable debate and some occasional merriment have arisen over the exclusion of “obscene or immoral” books. What is an obscene or immoral book? Until a short time ago this question was left to the decision of customs officials. They could decide just what “foreign” books were “bad” and prevent professors of literature from using them in class instruction! Congressional debates on this question in connection with the tariff act of 1930 entertained some citizens and scandalized others. The result was a compromise. Obscene or immoral matter or objects are still barred; but one may appeal a case of customs censorship to the Secretary of the Treasury, who may let down the bars for classics and scientific works imported for noncommercial purposes. Furthermore, a federal district court may pass upon the merits of a book found by customs officials to be “immoral and obscene.” In 1934 a district court held

²⁴ C. A. and Wm. Beard, *op. cit.*, pp. 602-614; M. S. Callcott, *Principles of Social Legislation* (1932), Ch. VII; E. Freund, *The Police Power* (1904), Chs. VII-IX; L. M. Hacker, “The Rise and Fall of Prohibition,” *Current History*, September, 1932, pp. 662-672; National Commission on Law Observance and Enforcement, *Report on the Enforcement of the Prohibition Laws* (No. 2, January 1931).

that James Joyce's *Ulysses* was not obscene, overruling the findings of the customs officials.²⁵

The commerce power is further used to prevent the transportation of women for immoral purposes. Long ago, prostitutes were denied admission to the United States, and the Mann Act (1910) prescribes a heavy fine and imprisonment for any person who transports a woman or girl in foreign or interstate commerce for an immoral purpose, thus striking commercialized vice an effective but by no means a fatal blow. Notice that Congress did not attempt to prohibit prostitution. It has no power to do this.

The commerce, taxing, and treaty-making powers are all invoked to regulate traffic in narcotics. Both their importation and exportation are definitely restricted by law, and we co-operate with other countries in exchanging information necessary for intelligent regulation. Producers of opium in the United States must pay a very high excise tax and furnish a proportionately high bond. Dealers must pay a small license tax and submit to elaborate sales regulations. These regulations are designed ostensibly to prevent the dealers from escaping the payment of the tax, actually for the purpose of securing a degree of control over a devastating evil.

2. PROHIBITION. Many states "went dry" before the Eighteenth Amendment was adopted. But intoxicating liquors were still legitimate articles of interstate commerce and states could not prevent them from being shipped in. Congress came to the aid of the dry states, however, particularly with the Webb-Kenyon Act of 1913. This act forbade the interstate transportation of liquor intended to be used in violation of state laws, a notable concession to the dry states. In 1919, with the adoption of the Eighteenth Amendment, legal prohibition came for the entire nation. "The manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes" was prohibited, and Congress and the states were given concurrent power to enforce the Amendment by appropriate legislation.

The problem of enforcement. Practically all of the state legislatures passed enforcement measures, some of which were very drastic. Congress passed the Volstead Act, which, defined as intoxicating any liquid fit for beverage which contained as much as one half of one per cent of alcohol. The act also contained numerous regulations for enforcement, prescribed penalties for violations (not more than six months' imprisonment or \$1,000 fine for the first offense), and set up enforcement machinery. Enforcement was not successful in every part of the country, being espe-

²⁵ *Time*, January 29, 1934, p. 49.

cially difficult in large cities and industrial centers. A few states repealed their enforcement laws. In the hope of improving enforcement, Congress put Prohibition officers under the merit system in 1927, and three years later moved the enforcement unit from the Treasury Department to the Department of Justice and reorganized the enforcement agency as the Bureau of Prohibition. In 1929 the Jones-Stalker "five and ten" Act was passed. Aimed at commercial violations of the law, the maximum penalty was fixed at five years' imprisonment, or a \$10,000 fine, or both.

Prohibition repeal. In the meantime, Congress and the President decided that the whole question of Prohibition enforcement, as well as law enforcement in general, should be studied. The President appointed a National Commission on Law Observance and Enforcement, composed of very distinguished citizens and headed by George W. Wickersham. After eighteen months of investigation, they submitted an 80,000 word *Report on the Enforcement of the Prohibition Laws*. The commissioners were divided in their views, and their report could hardly be expected to "stimulate the clarification of the public mind," as President Hoover stated it should. The report did, however, stimulate public discussion, and the more the subject was discussed the more apparent it became that the country was ready to abandon the Prohibition experiment. The Twenty-first Amendment was put through Congress while we were at the bottom of the depression (February, 1933) and it was ratified by conventions in the states before the end of the year. In addition to the repeal of the Eighteenth Amendment the Twenty-first prohibits the transportation or importation of liquor into dry territory. This simply amounts to putting the old Webb-Kenyon Act into the Constitution. As some difficulty attended the enforcement of that act in the days when automobiles were few and slow and there were no airplanes, there is some reason to fear that the obligation to protect dry states will be even more difficult to meet in this new era of speed.

With the ratification of the Twenty-first Amendment, the Federal Alcohol Control Administration was established and it was charged with the duty of administering the alcohol industry under an N.R.A. code of fair competition. After the Recovery Act had been invalidated the F.A.C.A. was given a legal basis through a new act of Congress. This agency was abolished in 1940 and its functions were transferred to the Bureau of Internal Revenue. Persons desiring to engage in making or distributing alcoholic liquors must secure permits from this Bureau and comply with all federal regulations.

State regulation: 1. **LIQUOR AND TOBACCO.** Although the national government may, through its powers expressed and implied, take a hand in regulating public morals, the subject is one which in the main still belongs to the states. The control of the liquor business was almost en-

tirely a state function until the adoption of the Eighteenth Amendment, and since the repeal of that Amendment the states again have the chief responsibility for liquor control. Only three or four states remain dry. A larger number (perhaps a third) have made the sale of liquor a state monopoly. It seems to have been demonstrated that such a monopoly, properly administered, is one of the best means of handling the sale of liquor. Incidentally, it has yielded some states considerable revenue. A majority of the states regulate the traffic by the licensing system. A liquor control board in practically every state administers the liquor laws. This central system of control ought to give better results than were obtained under the old pre-Prohibition system which left very wide discretion to local authorities. Tobacco has felt the force of state regulation in some quarters. Sale to minors is often prohibited. From time to time a state has resorted to more drastic measures, such measures usually making the sale of cigarettes illegal. Enforcement is commonly found to be a discouraging undertaking, often a farce.

2. GAMBLING. One of the "besetting sins" of mankind is gambling. The states undertake to prohibit, restrict, or localize its various forms; but it is generally conceded that it cannot be absolutely eradicated. Common gamblers, under most criminal codes, come within the classifications of vagrants and vagabonds. The act of gambling is usually prohibited in public conveyances and certain other public places. Keeping places for gambling is ordinarily a criminal offense. The familiar slot machine falls under the ban in many states. Horse racing is the subject of legislation largely because of the betting connected with it; but everyone knows that the laws have not stopped "playing the ponies." The lottery was formerly in good standing, both legally and morally. Now it may be necessary to explain that a lottery is a scheme for the distribution of money or property by chance among persons who give a valuable consideration for the chance. Some of our very fine, even denominational, colleges obtained funds a century and a quarter ago through lotteries. But their demoralizing effect seemed to grow, or the conscience of the nation was awakened, with the result that they are now forbidden in every state.²⁶

3. SEXUAL VICE. Sexual vice has been a problem in all periods of recorded history. Although generally admitted to be ineradicable, prostitution is given the sanction of law in but few countries. Some foreign governments regulate prostitution, thereby implying a legalization of it within limits; but in other countries and in practically all of the American states, it exists only by sufferance. Measures of repression and restraint are taken against both prostitutes and places of prostitution, the measures being vigorous or mild, depending upon the instructions to and the attitude of the police. A common proceeding against the women is

²⁶ Freund. *ob. cit.*. Ch. VII.

to arrest them as vagrants; that is, as persons without legitimate means of support and as likely to conduct themselves offensively in securing a livelihood. A house of ill-fame may be closed as a nuisance. The states also have their laws against lewd and lascivious conduct, obscene publications and performances, and similar conduct or practices conducive to vice.²⁷

The problem of enforcing laws relating to morals. It is one thing to get a law on the statute books and another thing to have it enforced. That statement is as true as it is trite. It is especially true of laws respecting public morals. Lawmaking is national or state (leaving out of consideration municipal ordinances of regulatory nature); law enforcement is local. Here a good deal of the trouble lies. A legislative body in which rural representatives hold a majority passes a law prohibiting, let us say, betting on horse races. In the cities, those who promote horse races, those who attend them, and those who police them, may think the law against betting is absurd. Consequently, the law will not be enforced in those localities. It will probably not be enforced anywhere except where there are no horse races! The same story will apply to a number of other laws. Another type of law is indifferently enforced, not because the practice against which it is directed is not a recognized evil, but because local opinion considers attempts at prevention futile.

The question naturally arises, "Why pass laws which are not or cannot be enforced in communities which seem to need them most?" Well, in the first place, a legislative body responds to the will of the best organized and most persistent group, the group which controls the most votes. Moral reformers often have many votes behind them. But why do the reformers want a law that cannot be enforced? They will seldom admit that it cannot be enforced; they assert that where enforcement fails, it is because the proper efforts were not made. Furthermore, the reformer thinks (and this a reformer will seldom say out loud), even if enforcement is not possible, a moral gesture in statutory terms should be made against an evil practice; otherwise the surrender to the powers of darkness is complete. The writer does not mean to imply that there should be no legislation against moral evils. Far from it! But he does mean to say that in so legislating we should be sure to direct our efforts only against practices generally recognized as immoral and that the statutes should be so shaped that their enforcement would be practicable. For those practices which we regard as demoralizing but with which the law cannot cope, we should be content with moral denunciation and education.

²⁷ *Ibid.*, Ch. IX.

IV. SOCIAL SECURITY ²⁸

A century ago the insane, the feeble-minded, the cripples, the blind, to say nothing of the unemployed, the sick, and the aged, were left to find what succor they might from private sources. The state assumed practically no obligation for these unfortunate millions. But scientific knowledge, perhaps a growing sentiment of humanity, and in particular the change from an agricultural civilization to an industrial one have wrought a great change. Private charity still flourishes and should continue to function, but the state has had to assume the major rôle in caring for the helpless, and in recent years it has stepped in to provide unemployment insurance and old age annuities for workers.

State institutions for dependents. In the rugged days of a century ago, dependents of almost every description and condition were often sent to county poorhouses. A more enlightened society has gradually segregated the various classes and established separate state institutions for them. About the first class to be thus segregated was the insane. The harmless insane were brought from the poorhouses and the violent insane from the jails, and were given appropriate care, sometimes in private asylums subsidized by the state and sometimes in state hospitals. The latter method of care is at present almost universal. Mental defectives now constitute the largest class of public dependents. Somewhat in keeping with the advance of knowledge concerning the feeble-minded, the epileptic, and other classes of unfortunates, nearly all of the states have established separate institutions for them. Educational institutions are maintained at state expense for the deaf, the dumb, and the blind. These individuals are not charity cases. They receive their training under the sound theory that they are entitled to public education, just as the other youths in the state. Furthermore, if the state did not educate them, many of them would become its dependents.²⁹ Another type of state institution, the hospital for the indigent sick and for those afflicted with certain diseases, was mentioned under the section on health protection.

THE PROBLEM OF ADMINISTRATION. The management of these institutions, including the difficult task of selecting properly qualified personnel, purchasing large quantities of supplies, and keeping "politics" out of both duties, is full of perplexities. Formerly, the practice was to create a board for each institution; but the newer tendency is to put all similar establishments under the same board. In some states this movement has

²⁸ Grace Abbott, *From Relief to Social Security* (1942); P. H. Douglas, *Social Security in the United States* (1939 ed.); Fairlie and Kneier, *op. cit.*, Ch. XIV; J. P. Harris, "The Social Security Program of the United States," *Am. Pol. Sci. Rev.* (1936), XXX, 455-493; Macdonald, *American State Government and Administration*, Chs. XX; Munro, *op. cit.*, Ch. XXXVII; M. S. Stewart, *Social Security* (1939 ed.); *Reports of Social Security Board*, and the *Federal Security Agency*.

²⁹ Bates and Field, *op. cit.*, pp. 360-362.

gone so far that all correctional institutions, including prisons, as well as the charitable establishments, are placed under a single, general agency. It is generally thought that a centralized plan is the better; that it makes for uniform practices, secures a higher quality of service, and effects economy in management and in the purchase of supplies. But it is usually found difficult to keep the spoils system out of the management of institutions, whatever the plan of supervision may be. In any case of mismanagement, the inmates of charitable institutions are the chief sufferers. Every little while we hear of brutal treatment, impure food, or some other indefensible condition (always promptly denied by those in authority) at a charitable institution. While the condition complained of sometimes exists only in the imagination of some soft-hearted or excitable person, all too often there is much truth in the charge.³⁰

Poor relief. The duty of taking care of the poor is still largely a local function; but the states care for those whose maintenance is not properly chargeable to any local community, and it is customary also for states to provide accommodations for the poor who need special treatment, regardless of residence. In the latter case, the county of residence is commonly charged for the service. States sometimes maintain orphans' homes, a service in which religious and other private organizations long led, and still lead, the way.

Mothers' pensions. The type of relief mentioned above is commonly called institutional or "indoor" relief. "Outdoor" relief, or home relief, that is, the giving of aid without commitment to an institution, is now becoming more common than the older form. It is socially more desirable, since it avoids breaking up homes, but is perhaps a little more costly. A form of this type of relief which is very generally commended is the mother's pension. Beginning with Illinois and Missouri in 1911, forty-five states and the District of Columbia now provide allowances for widows and deserted wives who have no adequate means for the support of their small children. This allowance, varying with the age and number of the children, secures to them a mother's care, the most essential need for normal development.³¹

Local relief. Counties and cities, acting under state authority and under varying degrees of state supervision, play an important part in poor relief administration. Nearly all of the counties and many cities make provisions for indoor relief in a poorhouse, almshouse, or "home." Whatever the name, the place is about the same, a poorhouse, "a perfect testimonial of man's inhumanity to man, as well as a conspicuous example of inefficient and reactionary government,"³² states the Virginia

³⁰ C. A. Beard, *American Government and Politics* (1939 ed.), p. 661.

³¹ Grace Abbott, "Victories for Child Welfare . . ." *New York Times*, April 10, 1932, 4-XX.

³² Fairlie and Kneier, *op. cit.*, p. 283.

Board of Public Welfare in reference to the almshouses of that state. The same characterization would apply to these "homes" in a number of other states. It is suggested that great improvements could be made, both in economy of administration and in the treatment accorded the inmates, by materially reducing the number of institutions and putting them under state control. This plan, or a modification of it, is being followed in several states. Outdoor as well as indoor relief is furnished by local guardians of the poor in accordance with state law, which usually allows such guardians considerable discretion. Owing in part to the inadequacy of state laws and in part to the indifference and incompetence of county officials, county administration of charities cannot be very highly commended. The cities perform the work a little better.

The Federal Social Security Act. Up to this point nothing has been said of the able-bodied factory and white collar workers who, even in normal times and through no fault of their own, often find themselves without employment. In 1929 the number of unemployed was 2,000,000; in 1933, 13,500,000; and in 1936, although there were many signs of returning prosperity, 12,000,000.³³ The figure for 1936 leads us to reflect that the old "standard" of 2,000,000 unemployed in normal times may not return for many years, if ever. Then, there is the problem of the aged worker, or, more broadly speaking the problem of security for the aged. In 1900 there were 3,000,000 persons over 65 years of age in the United States; in 1930, 7,500,000; and it is estimated that there will be 15,000,000 such persons in 1970. The number of men and women over 65 years of age thus increases in much more rapid proportion than the population as a whole. Not only that, but the percentage of unemployed aged persons steadily increases. Only about 25 per cent were unemployed in 1890, but more than 40 per cent were in that class in 1930. The problems of unemployment and security for the aged are the two most urgent problems our industrial civilization has left on our doorstep.

Long before governments assumed any responsibility for the unemployed, labor organizations established funds which were distributed to members who were out of work. But these funds protected only a small percentage of the workers and they were wholly inadequate to meet any prolonged or wide-spread unemployment. Governments came to the rescue, beginning about 1900. Belgium, France, Holland, Finland, Great Britain, and others assumed this new obligation. Wisconsin was the first American state to pass an unemployment insurance act (1932).

Assistance for the aged has been provided by practically every government in Europe. The first old-age insurance system was installed in Germany (1889) as one phase of Bismarck's strategy in his fight with the Socialists. In general, old-age pension laws preceded the enactment of unemployment insurance measures. The American states did not take

³³ A.F. of L. estimates.

up the idea of old-age pensions until after the First World War and it was not until after 1930 that there was any general movement toward such legislation. More than half the states had some sort of pension assistance for the aged at the time the Federal Social Security Bill became a law.

During the depression the dogma that each community should take care of its own needy gave way to the sound principle that the problem was national in scope. The national government voted direct grants to the states for relief and provided numerous agencies (P.W.A., etc.) through which workers might be re-employed. This help was regarded as only temporary, and the need for a permanent plan for the security of workers was emphasized in many quarters, the President himself assuming the position of leadership. The Social Security Act (August, 1935) was the outcome. It is now our purpose to outline its main provisions.

UNEMPLOYMENT COMPENSATION. "The life of the worker is continuous. The income from his job obeys the tides of the market; his expenses click on endlessly with the clock. This is the case for unemployment compensation."³⁴ The Social Security Act does not actually set up a system of unemployment compensation, but it does provide a framework within which states may establish such compensation systems. A federal payroll tax of 3 per cent is imposed upon all business enterprises employing more than eight persons.³⁵ If a state has an acceptable unemployment insurance plan, the employers are allowed to deduct from the federal tax an amount up to 90 per cent of the total they pay into the state fund. The workers may or may not be required to contribute, depending upon state law. All of the states have laws which have been approved by the Social Security Board. A few of them require contributions from the workers; most do not. The conditions under which workers receive unemployment compensation and the amount they receive varies among the states. In order to be eligible to benefits, a worker must have been employed for two months, or four months, or for some reasonable length of time, depending upon the law of his state. In like manner, the amount of benefit he may receive per week and the number of weeks it may run in any one year varies among the states. Half the weekly wage for eighteen weeks in any year seems to be about the average allowance. Experience has revealed a number of inconsistencies and inadequacies in the system, and there is every likelihood that significant changes will be made after the war.³⁶

OLD-AGE AND SURVIVORS INSURANCE. "The worker's living comes from his job; yet his life is likely to outlast the skills which he can market. Neither wages nor savings can be depended upon to protect him against want in old age. The way of industrial provision is beset with too many

³⁴ *Report of the Social Security Board, 1936*, p. vi.

³⁵ Farm labor, domestic servants, and a few other classes are not included.

³⁶ *Report of the Social Security Board, 1941*, p. 20.

perils for safety. This is the case for old-age benefits.”³⁷ Consequently, Congress provided a plan of old-age and survivors insurance in article II of the Social Security Act. It is administered directly by the Social Security Board and it is the only part of the social security program which is so administered. All employees except those engaged in agriculture, domestic service, government service, and teaching are brought within the provisions of the act. Government employees and teachers almost invariably have their own retirement and annuity plans. The two classes omitted from insurance benefits are, therefore, domestic servants and agricultural laborers, and the number in these two groups is around 25,000,000. The act provides monthly benefits for workers and their wives when they reach the age of 65, as well as for their children under 18 years of age. It provides also benefits for widows and aged dependent parents of deceased workers.

The original provision of the Security Act required both employer and employee to pay annually into the federal treasury 1 per cent of the salary or wages. This was to have been stepped up until it should reach 3 per cent in 1949. But on various grounds there were objections to these increases, and when the date for the increase to 1½ per cent arrived (1940), with more than enough money in the treasury to meet the benefit payments due, Congress decided to leave the payments at the original 1 per cent. It now appears that this was an unfortunate decision, because larger deductions from pay rolls and dividends would serve in some measure to combat inflation which is now upon us.

OLD-AGE ASSISTANCE. There are and will be many aged people in need who are not under the insurance system just described. What is done for them? At the time the Social Security Act became law, more than half the states had old-age pension systems, only a few of which were adequate. To induce the states which had pension plans to improve them and to encourage other states to adopt them, the act, as amended, holds out an offer to meet half the cost of old-age pensions up to a combined federal-state total of \$40 a month. In order to get this federal aid, the state plan must limit assistance to those 65 years of age or over and it must accept as eligible for benefits any needy person who has resided in the state 5 of the 9 years preceding the date of his application for assistance. The Federal Bureau of Public Assistance reviews state plans and approves them if they meet the standards required by law. All the states now have approved plans, plans which vary considerably, both as to amounts paid the needy and as to the conditions under which payments are made.

ASSISTANCE FOR CHILDREN AND THE BLIND. The Security Act also aids states on a fifty-fifty basis up to a combined federal-state total of \$18 a month for the first child and \$12 a month for each additional child in any one home, provided, of course, such child or children are needy and

³⁷ *Ibid.*, 1936, p. vi.

under 16 years of age (or under the age of 18 if in school). Federal aid to the states for the needy blind is granted in the amount and on essentially the same basis (without the age limitation) as it is granted for the relief of the aged.

MATERNAL AND CHILD WELFARE SERVICES. Under the terms of the Security Act annual appropriations of about \$10,000,000, part on a "match the federal dollar" basis and part in outright grants, for maternal and child health services, services for crippled children, and services for homeless, dependent, and neglected children. This part of the act, logically enough, is administered by the Children's Bureau of the Department of Labor. All of the states are co-operating in providing these services.

VOCATIONAL REHABILITATION. The preparation of permanently disabled persons for employment is another phase of the security program. The cost of maintaining a disabled person at public expense ranges from \$300 to \$500 per year. The average cost of rehabilitating a disabled person is \$300. The average earnings of a rehabilitated person are about \$18 per week. It appears, therefore, that this great social service is economically sound. As long ago as 1920 Congress inaugurated this service through grants-in-aid to the states. The Security Act makes a substantial increase in authorization of appropriations for this work and the states are now expanding their rehabilitation programs.

Viewing the act as a whole one must conclude that it is a cautious approach to the security problem. It is in no sense a complete solution, but the advance made is a distinct achievement, one which in the complacent 'twenties seemed remote indeed. It is criticized from two quarters, by those who say it is grossly inadequate and by those who in decreasing numbers declare that it is revolutionary, a blow at democratic government. No doubt difficulties will continue to arise in its administration, and no doubt there will be need from time to time for amendments. No legislation of this type could possibly be drafted which would not later need revision and correction. Even a "perfect" state must be changed to meet new conditions.

V. EDUCATION ³⁸

Education is primarily a state and local function, although some aid and encouragement comes from the national government.

Federal aid and encouragement. Educational assistance from the central government takes several forms. The famous Land Ordinance for the Northwest Territory (1785) initiated the practice of setting aside federal lands for the public schools. The far-reaching Morrill Act of 1862

³⁸ W. H. Burton, *Introduction to Education* (1934); J. D. Russell and C. H. Judd, *American Educational System* (1940); R. M. Hutchins, *Higher Learning in America* (1936); H. D. Gideonse, *Higher Learning in a Democracy* (1937).

and subsequent acts granting support to agricultural education were discussed in the last chapter. The Smith-Hughes Act (1917) and annual appropriations under it extend aid to states that "match the federal dollar," for the teaching of trades, home economics, and industrial subjects. In the expenditure of funds granted under this act and other federal aid acts of the past forty years, the states must submit to a great deal of federal supervision. Since 1933 rather generous federal grants have been made for educational purposes, a large part of this money going directly to students. In addition to aiding education by subsidies, Congress has established an Office of Education. Formerly in the Department of the Interior, this office now functions as a unit of the Federal Security Agency. The Office of Education distributes the federal appropriation to the land grant colleges, administers the federal vocational education acts, supervises the program for vocational rehabilitation, and performs a few other administrative duties. But its chief work is in educational research and promotion. It conducts surveys of higher institutions of learning and secondary schools, makes studies of such special problems as the professional education of teachers and school finance, holds educational conferences, and gives counsel and advice to state and local school officials on various subjects.

State educational policy. With a few exceptions, the colonies left education to private individuals and institutions. But following the Revolution, the idea of elementary education at public expense gained rapidly, and in the course of time this became the practice in every nook and corner of the country.³⁹ Secondary schools and state universities were added to the state program; but not always in logical sequence, the university sometimes being established first. In our own time we find that the constitution and laws of a state usually call for elementary, secondary, and vocational schools, teachers' colleges, an A. and M. college, a university, and certain other institutions of learning. State laws also prescribe in considerable detail the methods by which education shall be financed, stipulating, for example, the manner in which funds shall be raised for the higher institutions, what part of the total cost, if any, of secondary and elementary education shall be chargeable to the state, and how the local units shall raise their quotas of the cost. The laws also commonly provide for a state school board and a superintendent of schools, charging them jointly or separately with the duties of making rules and regulations respecting the state public-school system, conducting inspections, licensing teachers, collecting statistics, and similar responsibilities. Ordinarily, the board determines questions of policy, and the administrative work is done by the superintendent. The state colleges and universities are very

³⁹ Long after their establishment, however, the "free schools" in some sections of the country, particularly the South, were looked upon as schools for the poor and were sometimes openly referred to as such.

commonly left free of the state school board and the superintendent of schools. A separate board, often a separate board for each institution, administers them.

HIGHER EDUCATION. Although a few of the Eastern states with very old privately endowed universities have no state institution by that name, all the other states have. Attendance in the universities and state colleges, as well as in the private institutions of higher learning, has increased most remarkably in the past generation. In the old days the favored few went to college to acquire the learning and culture a "gentleman" was supposed to have; the masses now go for the purpose of receiving training that will enable them to make a living. The colleges have responded to this new demand, particularly the state institutions, by offering vocational courses in an array of subjects never dreamed of by the pedagogues of a hundred years ago and which amaze the European and bring forth some adverse criticism in our own country. Liberal education is not omitted from the curricula, but critics say that undue emphasis is given the vocational subjects. Still, there is a great deal to be said both for the democracy which provides it and for the system itself, the system which prepares students to make a living. Another feature of our higher educational system is the opportunity it "gives a poor boy to work his way through college." This is not possible in many other countries. It is often referred to as one of the glories of the American system. The "poor boy" does not always eventually triumph, as in the story; but he is given his chance. Those who cannot attend college have their chance also. The college goes to them through its extension professors sent to give courses at local centers and through the correspondence courses which can be taken wherever mail is delivered.

PUBLIC SCHOOLS. The state usually fixes a minimum standard for the public schools, exercises some general supervision to see that those standards are maintained, grants a small subsidy for the support of the schools of each district, and leaves the rest to local initiative and enterprise. Each county, city, township, or whatever the unit may be, has its school board of laymen, and the larger units have their professional superintendents also. The board has general authority in school matters and quite often has the power, within certain limits, to fix the school levy. Communities almost invariably take great pride in and often make considerable sacrifice for their public schools. We take it as a matter of course that the school building shall be the best and most conspicuous structure in a small town. A number of distinguished foreigners who have found many features of American culture about which to make caustic comment are favorably impressed with the dominance of our public schools. In the town and to some extent in the cities, the school is not just the school, but it is a center for recreation and social life as well.

As for courses of instruction, preparation for college is not forgotten; but the "practical" courses are emphasized more and more—courses which will fit the students to become breadwinners. Nearly all the larger cities have special vocational schools for training students in electrical installation, plumbing, printing, stenography, home economics, and a host of other trades and callings. Night schools are now commonly provided for youths who must earn a living during the day and for adults who did not have advantages earlier. A number of cities provide junior colleges and a few have established municipal universities. Schools for such classes of unfortunates as the tuberculous have been founded in some areas. In a discussion of education, the public library, the handmaiden of education, should always be mentioned. Practically every city of any consequence now has a well-equipped free public library. Rural communities sometimes receive a lesser service through the "traveling" library. An economy of the depression years which people of vision have generally condemned is the very severe reduction made in appropriations for libraries.

The problem of finance. The schools cost a great deal of money. Approximately a third of the state and local revenue goes for education. It is generally thought that the schools are worth the money and that there is less waste and extravagance in school expenditures than in most other public expenditures. However, in times of retrenchment, the schools have sometimes been the special target of attack. The small salary of the thrifty teacher now appears very large to the deflated business man. The whole school system is attacked as extravagant. It is right that the schools should be asked to reduce costs; but straight percentage reductions, easy to calculate and often employed, may result in the curtailment of a particular school service which we are most anxious to preserve.

Another financial problem is that of the rural school. The cost is high and many rural communities are poor, depression or no depression. Since the funds must be raised primarily from taxable property in the district, it follows that taxpayers in a poor area will have to pay much higher school taxes for the same type of school than are paid by their more favored brethren in a wealthy district. A partial solution lies in the consolidation of schools. But, while consolidation gives better schools, it does not improve the financial situation a great deal for the impoverished areas forming the larger district. A better solution is for the state to assume more financial responsibility for the schools and give aid to local communities in proportion to their needs and deserts. Who objects to this? Naturally the taxpayers in the more prosperous areas of the state, who say that each township should educate its own children, a theory which is just one step ahead of the one held before the dawn of this Republic, namely, that each family should educate its own. Never-

theless, a number of states have come to the aid of the rural communities in the manner here suggested.

Even the great cities have their problem of school finance. It is that the school board, the largest spender in the city, is usually empowered to fix a school tax rate and spend the money as it sees fit. This makes it impossible to treat city finances as a unit. While the council may be retrenching in the services for which it votes appropriations, the board of education may be increasing appropriations for the schools. It is perhaps desirable that the school budget be approved by the council, thus making it possible for all the city services to be considered on an equal footing, the needs of each being considered in relation to all the others and total appropriations being limited to an amount not unduly burdensome on the taxpayers.

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The United States at War

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"They cannot harm us; we are too far away. Besides, someone may assassinate their leader. We hear that his people are 'fed up' with him. Even if they get here, something will turn up to prevent their attacking us. And if the attack should actually take place, a million men will spring to arms and drive them into the sea." The speaker is the typical American of practically any period of our history indulging in one of his favorite pastimes, the enjoyment of his "immunity complex." The "bone head" of the comic strips gets out of all of his scrapes; Superman never fails to annihilate his enemies; and, whatever her mishaps and misadventures may be along the way, the girl in the magazine story invariably gets her man. So it has been and so it will be with our country—danger may be imminent, neglect and incompetence may invite disaster, but we will find, or good luck will provide, a happy end to every crisis.¹ Thus reasons the American.

It is true that geographical position, economic resources, the enterprise of our people, and good luck have thus far brought us safely through every military threat. But in these days of rapid transportation geography does not vouchsafe to us the immunity of old; our continental economic resources are found to be less than sufficient for the conduct of total war; and, luck, although at times a very present help in the time of need, has ever been wholly unreliable as an ally. We have fought a number of wars, each in the hope, and sometimes in the rather firm belief, that it would be the last. But crises in other lands fade our hopes, and bombs dropping on our ships and soil shatter our beliefs. Once more war comes.

It is the purpose of this chapter to give a summary of the military policy of the United States, to indicate the military role of the President and Congress, both in peace and in war, to outline our system of organization for war, to review the organization of the armed forces and the fighting machines at our command, to discuss some phases of economic mobilization and civilian defense; to note some of the activities and possibilities of the United Nations; and to consider the effect of war upon our democratic institutions. Such a survey is indeed a "large order."

¹ This analogy is suggested by Norman Cousins in his "The Immunity Complex in America," *Saturday Review of Literature*, October 18, 1941.

I. AMERICAN MILITARY POLICY²

Traditional attitude toward the Army. It is true that we have not been a militaristic people. Despite our readiness to take up arms when we see our security threatened, we have hated war. One is tempted to say that our hatred of war has caused us to place a premium upon military inadequacy and inefficiency (in time of peace). Because we regard war as an evil, we have allowed our armies to rot. Contemptuous of the military profession, we have inwardly booed at passing soldiers. The generals who have captured our imagination have often been civilian or near-civilian generals. There was Washington, the farmer who renounced his office and power; Jackson, the frontiersman and planter; Harrison in his "log cabin"; Grant, who had retired from the Army and came back to lead it to victory; and Theodore Roosevelt, who, with practically no military training, earnestly and eagerly sought to lead an army in the First World War. Our fear of military abuses, which we inherited from Puritan England, and our reliance upon a Navy to protect us from any possible and distant enemies have caused us to look upon a strong Army as an expensive luxury and as a danger to our democratic institutions.

In the early years of the Republic the regular Army was practically nonexistent. Statesmen like Washington, Jefferson, and Hamilton favored a well-regulated militia. By act of Congress (1792) a militia was indeed provided, all men between the ages of 18 and 45 being required to serve and furnish their own equipment! The "system" was highly unselective, grossly inefficient, and thoroughly unworkable. It was purely political in its inception and equally political in its organization. Within its ranks in 1808 could be found 80 major generals, 226 brigadier generals, 1033 colonels, some 9,000 captains, and about 650,000 non-commissioned officers and privates. Practically every politician held military rank and nearly all of them had plumed hats and tinsel uniforms. Military training was a burdensome detail with which they were not concerned. It was an army composed largely of this untrained militia which, in 1814, ignominiously fled from a much smaller British force and left our national Capital to be burned. It is true, however, that these militiamen could stand behind cotton bales and trees and shoot straight. This they did at New Orleans.

After the War of 1812, West Point developed into an excellent training school for officers. To its graduates went practically all of the commissions in the small Army. Americans in general paid little attention to West Point and probably gave less thought to the Army. As a matter of

² W. D. Boutwell and others, *America Prepares for Tomorrow* (1941), Pt. II; H. S. Commager and others, *America Organizes to Win the War* (1942) Ch. II; Pendleton Herring, *The Impact of War: Our American Democracy under Arms* (1941) Chs. II-III; O. L. Spaulding, *The United States Army in War and Peace* (1937).

fact, in the thirties and forties, some of the best thinkers in the country were definitely anti-Army, pacifists. Nevertheless, the Mexican War demonstrated the value of well-trained officers who, despite their forced reliance upon green volunteers, won an easy victory.

We did not, however, profit by the experience of the Mexican War. Within legislative halls and on public platforms the dangers confronting the nation were stressed, but nothing was done to strengthen the armed forces of the country. It may have been that leaders feared that such action would alienate the South, or that the South, a dominant section at the time, prevented any addition to the military establishment. At any rate, 1861 found the few thousand men who constituted the regular Army scattered over the states and territories in small detachments, scores of the best army officers resigning their commissions without any particular protests from their superiors and leaving to accept service with the Confederacy, the militia untrained and unequipped, and the War Department manned by old and incompetent men. The result was Bull Run. Not until the middle of the war between the states did the Union have a first-class Army. With the end of that struggle the Army went back to the desks, the shops, and the ploughs. A few soldiers were retained to keep the Indians quiet, but no more attention was given the Army than had been accorded it prior to the internecine strife. The Spanish-American War proved only that when two blundering incompetents engage in war, the one less given to blunders and incompetence will win.

Mild improvements in military organization. Despite the easy victory over Spain, that victory led us to do what we had not done at the end of any other war—give attention to organization for war. With foreign possessions to garrison and administer, we required a larger standing army. Furthermore, the majority of Americans took the keenest pride in the fact that we were now a world power, and some of the old suspicion of an effective standing Army disappeared. President McKinley appointed Elihu Root Secretary of War. Mr. Root declared that he knew nothing about war and nothing about the Army, a declaration not far from the actual facts. But what the President wanted was an administrator of intelligence, resourcefulness, and imagination, qualities which Mr. Root possessed to a high degree. Under his leadership, between 1901 and 1903, the Army was reorganized, the militia overhauled, and the General Staff created. This is not to say that the problems of the military establishment were now solved—far from it; but the changes inaugurated did result in our being less unready for the First World War than we had been for any previous war. Secretary of War Newton D. Baker (1916–1921) proved himself as capable as an administrator as Elihu Root, the beneficial results of whose administration were still evident when Baker took office. Under Baker, the War Department, in striking contrast to its record in previous wars, functioned smoothly, the civilian Secretary and

the military experts dividing their functions in such a manner as to produce the least amount of friction.

Divided counsel, 1919-1933. Millions of Americans believed we had "fought this war (the First World War) to end war," but we refused to accept membership in the League of Nations, established for the purpose of preserving peace; we limited our naval armaments (even going to the extent of sinking some ships); we reorganized our military establishment; we insisted that our former allies pay their debts to us, and we declared economic war on them as well as on our former enemies by raising our tariffs.

We "stayed out of" the League of Nations for various reasons: there were those who sincerely feared it as a breeder of war in which American soldiers might be called upon to fight for the security of some foreign country; others who believed that we should not formally associate ourselves with "foreign organizations," and still others, principally party leaders, who saw opposition to the League as a good vote-catching device.

Naval armament limitations. The post-war policy of the United States in respect to naval armament calls for more than passing mention. The importance of the Navy in the defense of our shores has always been realized, and we have never been as suspicious of it or as miserly with it as we have often been with the Army. At the end of the First World War we were well on our way to having the strongest Navy in the world, a Navy which could have met all of the other navies combined. But at that time we did what most men interested in peace considered proper and noble—we agreed to a limitation of naval armament. Our Government called the Washington Conference (1921) for that purpose, and, to the amazement of realists the world over, proposed a straightforward plan for stopping the race in the construction of capital ships (ships over 10,000 tons displacement). The United States, Great Britain, Japan, France, and Italy agreed by treaty to the ratio, in the order in which these powers are named, 5—5—3—1.7—1.7, for capital ships. The ratio corresponded rather closely to that existing at the time the treaty was signed, but the sinking or scrapping of certain designated ships was necessary to achieve it perfectly. The powers further agreed to a naval holiday on capital ships for a period of ten years, with only limited replacements thereafter for five more years.

This agreement was part of a program to avoid trouble with Japan, with which nation we had had misunderstandings from time to time and with which, following the war, our relations had not been improved. Then both Japan and the United States made mistakes. When Congress, over the objection of the State Department, was considering Japanese exclusion in connection with the immigration bill of 1924, the Japanese Ambassador protested, stating that if the bill should be passed "grave consequences" were likely to ensue. Congress took this as a threat and im-

mediately passed the bill. Practically all Americans, including the Secretary of State, favored Japanese exclusion and Japan herself accepted it. The trouble arose only over the proposal of Congress to cancel the "Gentleman's Agreement" under which exclusion of Japanese had operated since 1907, and the unfortunate wording of the protest of the Japanese Ambassador. The situation was most unfortunate and it drew heavily on the good will which had made the Washington Conference a success.

Although the Washington agreement did not apply to auxiliary ships (cruisers, destroyers, and submarines), the United States practically stopped the construction of such ships. But the other powers did not interpret the Washington agreement in that spirit. Japan in particular was busy laying the keels of cruisers and other auxiliary craft. In 1927 the United States took a leading part in an effort to bring about a limitation on auxiliary ships, but no progress was made. Again, in 1930, the United States and Great Britain took the lead in trying to stop the armament race. The result was that the five powers met in London and reached another agreement. Under its terms the replacement of capital ships, allowable under the Treaty of Washington after 1931, would be postponed until 1936. The London Treaty also extended limitations to auxiliary ships. Although the naval experts of each of the three great naval powers (the United States, Great Britain and Japan) vigorously opposed the agreement, the governments of these countries ratified it. Japan then proceeded to build as many ships as the treaty allowed, Britain kept her construction well below the agreed limit, and the United States laid few new keels. Consequently, Japan made rapid gains in naval strength and, in 1935, actually surpassed the United States in effective auxiliary ships. Furthermore, exercising her right as a party to the Washington Treaty, Japan gave notice that she would not be bound by that agreement after December 31, 1936. In 1935 another naval conference was held in London. Japan, insisting upon parity in all classes of ships, bolted the conference when the United States and Great Britain resisted her demands, and the agreements the other powers reached were without particular significance. Efforts to limit naval armaments had failed.

The National Defense Act of 1920. After the Armistice of 1918 the War Department asked for a much more pretentious peacetime military establishment, including conscription and a billion-dollar annual budget, than Congress and the public were willing to grant. The National Defense Act of 1920 was a compromise measure, revealing several marked concessions to the strong anti-military sentiment. The General Staff was strengthened, but the plan for a large standing Army and peacetime conscription found no place in the statute.

Nationalistic tariff policy. Although it may not be true that our high tariffs of the post-war period were looked upon by other powers as a threat to their security in the sense that they might have regarded a fever-

ish construction of vessels of war as a threat to their security, it is a fact that these tariffs reduced the flow of goods from foreign factories to the United States and, since international trade must operate over a two-way bridge, noticeably restricted the opportunities of American manufacturers and producers to sell in foreign markets. In other words, tariffs, not ours alone but ours among others, contributed to the world-wide depression, to national frustration, to dictatorship and war. It cannot be said, therefore, that our policy in the decade following World War I looked consistently towards peace. Our counsels were divided; our purposes were sometimes obscure.

Nevertheless, as we came to the end of that decade, we failed to see a cloud in the broad expanse of the international sky. France and Germany had signed the Locarno Treaties; the United States was about to accept membership (but never did) in the Permanent Court of International Justice; war had just been "outlawed" by every great power and nearly all of the lesser ones; and in our Armistice celebrations, we noted our regrets for the past, our gratitude for the present, and our hopes for the future, by references to the days of forgotten hatreds.

The gathering storm. Yet there were some clouds in the sky, clouds which were larger than a man's hand. The Germans were not reconciled to the Treaty of Versailles, and Britain and France were hesitant to relax its rigors. Our own bubble of prosperity was about to burst, and some other countries had hardly experienced a bubble. The clouds grew larger and all could see them. Indeed they covered the nations of the earth with cold dark misery. The have-not and the dispossessed nations tried desperate remedies. In defiance of her treaty commitments Japan moved aggressively into Manchuria. Italy, long since taken over by Mussolini, moved into Ethiopia. Germany sought to find relief in Hitler, who declared he would tear the Treaty of Versailles to shreds, and upon assuming power immediately did so.

For some years the idea had been growing in America that we had been tricked into involvement in the First World War by English propagandists and our own financiers and munition makers. As the lights in Europe were about to be extinguished once more the idea gained many adherents. The one consistent thread that had run through our foreign policy since 1919 was that we wanted to be left alone to go our own way; that we wanted no part in any European struggle. The belief that we had been hoodwinked in the last war served as an additional incentive to stay out of the next. Determined to stay out of war, we made no preparations for it beyond embarking upon a modest program for strengthening the Navy. We sought our defense in another direction—in neutrality.

Neutrality legislation. In 1935 Congress enacted the first of several so-called neutrality acts designed to prevent our involvement in future

wars by prohibiting a repetition of what were conceived to have been the errors of the past. Two years later a more comprehensive act was passed. One section provided that whenever the President should find a state of war existing between two nations, or civil strife of such magnitude in a foreign nation as to threaten the peace of the United States, he should proclaim such fact and prohibit the shipment of arms, munitions, and implements of war to such countries or country. Another section of the act prohibited loans to belligerents. Already on the books was the Johnson Act of 1934, forbidding the making of loans within the United States to any foreign government in default on its debts to this Government. There will be no repetition of 1917, thought the authors of this statute; munitions makers and bankers will not be able to take us into another war. Others thought that this abrogation of rights under international law was a high price to pay for uncertain immunity. Still others held that the United States had placed itself in a position approaching the contemptible—a great power was seeking safety by trying to hide from danger!

Under this legislation the President “found” that civil war existed in Spain and failed to “find” that war existed between China and Japan, the reasons being that opinion in the United States was divided on the Spanish struggle and almost unanimous in favor of China in her fight for life. Thus war materials could still be shipped to China and, incidentally, to Japan. Despite the measure of flexibility the law allowed, the President maintained that it tied his hands in dealing with belligerents. In the summer of 1939, in expectation of war between Germany and Italy on one side and France and England on the other, the President asked for modification of the neutrality law, but Congress, hoping that there would be no war and fearful that the President’s well-known partiality to England and France might involve the United States if war should break out, was unresponsive. With the war a fact in September and with the President and a substantial body of the American public eager to give the Allies every assistance short of war, Congress yielded to the President’s entreaties and modified the neutrality act in two important particulars: it repealed the prohibition respecting the exportation of arms, ammunition, and implements of war from the United States to belligerents (so that the English and French, having command of the seas, could come and get them), and it made unlawful the carrying of passengers or materials on American vessels to belligerent nations. In short, the arms embargo was repealed, and all trade with nations at war was put on a “cash and carry” basis.

Aid to Britain. Then came the winter of the “phony war,” during which France sat beneath and behind her (imaginary) Maginot Line and Germany made careful preparations to crush her. The spring blitzkriegs followed, and as France was collapsing our President declared (June

10, 1940), "We will extend to the opponents of force the material resources of this nation." Late in the summer, both Roosevelt and Willkie, now in a hot presidential race were saying they favored all aid to Britain "short of war." The President was in position to give a concrete example of what he meant. On September 2, by authority not entirely clear, but with popular approval, he agreed to transfer to Britain 50 over-age destroyers in return for a 99-year lease for naval and air bases in the Bahamas, Jamaica, and in other British possessions in this hemisphere. The Berlin-Rome Axis then countered by bringing Japan into their alliance.

In the fall of 1940 the British made a magnificent defense of their island. They not only kept the Germans out but they also "brought the Americans in"—won a much wider popular support in America for their cause. A new idea for aid to Britain came to the President. On December 17, at a press conference, he announced it. It was that we forget the "silly-fool dollar sign," and instead of thinking in terms of selling war goods to Britain we should lease or mortgage them to her. These she could return or repay in kind when the war was over. We should do this, explained the President, on the same principle and for the same reasons that a man will let a neighbor use his garden hose to help the latter extinguish a fire. The neighbor will replace the hose if it is destroyed. At any rate the man may save his own residence by helping to extinguish a fire at his neighbor's. The "lease-lend" bill was prepared and presented to Congress. After two months of very active, and generally favorable, discussion, in Congress and out, it was passed. This "Act to Promote the Defense of the United States" authorized the President to arrange for the manufacture, to the extent to which Congress makes funds available, "any defense article for the government of any country whose defense the President deems vital to the defense of the United States." Congress provided the billions, and the program got under way. The neutrality acts to keep us out of war were forgotten. We were not yet in the war, but we were no longer neutral. We became "the arsenal for democracy." We would send materials; the enemies of the Axis would do the fighting. We would "Praise God and pass the ammunition"—from a safe distance.

Hemisphere defense. Another area of defense engaged the attention of our government. This area embraced the 20 republics to the south of us. Without their active co-operation, the United States could not hope to head off totalitarian penetration in this hemisphere. And it must be said that, prior to 1942 at least, Germany and Italy made considerable economic and cultural progress in their relations with some of the American republics. When the storm broke in Europe this country was in a better position to counteract this influence than it would have been fifteen years earlier, because President Franklin D. Roosevelt's "good neighbor" policy, for which Mr. Hoover is also entitled to some credit, was beginning to bear fruit. Consequently, in September, 1939, a Pan-Amer-

ican Conference met at Panama in an atmosphere of mutual trust. Among its achievements may be recorded the establishment of the Inter-American Economic and Financial Committee and the creation of a "neutrality belt" from which belligerents were to be barred in order that the republics might carry on their commerce in safety. The belt, largely a paper belt, extended from the shores of the republics in distances varying from 300 to 1,000 miles, roughly about 100 times the width of the neutral waters in which international law prohibits belligerents from prosecuting hostilities.

It should not be denied that hemispheric solidarity presents grave problems, for economically and culturally the republics of the south have looked to Europe rather than to the United States of America. Their language is European and their intuitions are mostly European. Many of these countries produce goods of which we already have a surplus or which we produce in large quantities. Therefore, they look to Europe for markets. Of course many of these markets are closed when Europe is at war, and this gives some commercial advantage to the United States. We have not been content to let the matter rest at that point, however—far from it. One of the most active agencies of the Government is the Office of the Co-ordinator of Inter-American Affairs, headed by Mr. Nelson A. Rockefeller. It is concerned with programs in such fields as the arts and sciences, education, travel, the radio, the press, and the cinema, which will further the national defense and strengthen the bonds between the nations of the Western Hemisphere. In co-operation with the Export-Import Bank and other agencies of the Government it formulates and executes programs in the commercial and economic fields. The consensus is that this Office has operated effectively.

National defense, 1940. While "lease-lending" to the Axis enemies and working for solidarity in the Western Hemisphere the United States was not idle in strengthening its own military establishment. As early as January, 1940, Congress voted increased appropriations for the Army and Navy. Less than six months later, when France asked for an armistice, the President and Congress moved to put the country on a war footing. The 76th Congress remained in session until its term expired. It raised the enlisted strength of the regular Army, the Navy, and the Marine Corps; it authorized an increase in the strength of the National Guard and provided for the establishment of "home guards"; it authorized many more planes for the Army and Navy; it approved a plan for a two-ocean Navy; and, most memorable, it provided for conscription in time of peace. Large sums were appropriated to carry out these plans, and organizations to mobilize men and materials (to be discussed later) were strengthened and new ones created. Progress in rearmament was not rapid, however, for we hoped to prepare for war with little disturbance of our normal life and we still hoped to avoid war.

Appeasing Japan. One policy we followed to avoid war seems to have been that of "appeasing" Japan. At the same time we were sending aid to China—which nation we, as a Government and people, wanted in all sincerity to assist—we were permitting the shipment of oil, metal, and other war materials to Japan. Perhaps it was our fond hope that these not inconsiderable favors would induce the Japanese rulers to turn a deaf ear to Axis courtship for an alliance. But the alliance was made (September, 1940), and Vichy France, completely under Axis domination, surrendered northern Indo-China to Japan. Nevertheless, we continued to permit the shipment of war materials to Japan; still hoping, it appears, to keep Japan out of the European war and in particular to keep her from attacking us while our attention was concentrated on the European front. It ought to be said also that certain commercial interests in America, profiting by the sale of these materials to Japan, vigorously opposed any suggestion that these sales and shipments be terminated. Finally, when in July, 1941, Vichy surrendered southern Indo-China to Japan, our Government shut off the shipments of oil and other war materials to Japan. Then came the period of futile negotiation between the United States and Japan, and while they were still in progress, the treacherous attack on Pearl Harbor.

Since 1935 our defense policy may be characterized as roughly analogous to the man who decides to defend his house by hiding in a closet; who later cautiously peeps out of the window and, seeing others defending their homes and, incidentally, his, sends out provisions for the fighters; who, still later, with an occasional glance at the back door, prepares to defend his house at the front door; and who is presently attacked at the back door.

II. WAR POWERS OF PRESIDENT AND CONGRESS ³

The war powers granted by the Constitution. Congress has the power to (1) declare war; (2) to raise and support armies; (3) to provide and maintain a navy; (4) to make rules for the government and regulation of the land and naval forces; (5) to provide for calling forth the militia, and for organizing, arming, and disciplining the militia when it is in the service of the United States; (6) to levy taxes and appropriate money for the common defense; and (7) to make any laws which may be necessary for carrying any of these powers into execution. The war power of Congress is, therefore, comprehensive.

The Constitution makes the President the Commander-in-Chief of the

³ Boutwell, *op. cit.*, Pt. I; E. S. Corwin, *The President: Office and Powers* (1940), Ch. V, and "The War and the Constitution: The President and Congress," *Am. Pol. Sci. Rev.*, XXXVII, 18 (Feb., 1943); Herring, *op. cit.*, Chs. V-VI; D. O. Walter, *American Government at War* (1942), Ch. III.

Army and Navy and of the state militia when it is called into the service of the United States. Certain other powers and duties which relate to the war power are conferred upon the President by the Constitution. They are as follows: the duty to execute the laws of the United States; the obligation (which he shares with Congress) to guarantee to every state a republican form of government and to protect each of them against invasion and domestic violence; and the right to make recommendations to Congress. It would appear that Congress has the greater part of the war power, and so it seemed to Alexander Hamilton, one of the framers of the Constitution. The truth is, however, that the President holds the center of the stage in the grim drama of war.

How Congress legislates for the Army. The theory is that Congress should fix the broad outlines of military policy and that the President and other administrative officials should carry it into execution. In order to determine a policy Congress should decide what we will defend, where we will defend it, and when we will defend it. Shall we defend this nation, its outlying possessions, the Western Hemisphere, or the whole world? Where shall we meet the possible foe or foes? Shall we sit and wait for them to attack us, go to meet them, or attack them before they start? It cannot be said that these questions have ever been decided. We have been divided in Congress and out between collective security and isolation, between preparedness and pacifism, between Anglophobes and Anglophiles, to mention only a few causes of divided counsels. Another difficulty in the way of formulating policy is the unpredictable action of other countries.

Each house of Congress has a committee on military affairs and a committee on naval affairs; each has a committee on foreign affairs; and each has two subcommittees on appropriations for the two armed services. To the extent that Congress fixes defense policy these six committees and four sub-committees have the principal responsibility for fixing it. In time of peace military affairs do not get much attention. The committees on these affairs may give as much as 80 per cent of their time to non-military subjects, such as war mothers' visits to Europe, battleground parks, and the leasing of shore lines. On the floor of either House one might hear discussion of what guns shoot straight, what a retired German admiral once told a member about the top-heaviness of a particular ship, and why somebody ought to be a captain in the Navy. These diversions do not contribute, or should not contribute significantly to the formulation of defense policy. Other members are concerned with the pleas of their constituents that a military post be retained, established, or enlarged in particular localities, without any regard to the actual part such army posts might have as units of training or of national defense. Many posts remain such because, sixty or seventy-five years ago, the Army used them as bases from which to defend the settlers from the Indians and local political in-

fluence has been strong enough to have them retained. The horse-raising states and the hay-growing states want more horses used in the Army, and their representatives in Congress often reflect their desires. A seaport city, interested in finding a market for potatoes, onions, and meat, and perhaps not entirely averse to the increased social activity a large defense service might bring to the community, urges a senator to do what he can to get the Fleet to pay it a visit, and he probably does. It is obvious that citizens who are apparently convinced that the way to protect America is to boost trade in local areas are no less to be censured than congressmen.

With very few exceptions our peacetime Presidents have not been greatly concerned with the Army, the Navy, or general defense policy. Furthermore, the American people have never displayed interest in such matters until danger is imminent. Consequently, the professionals in the armed forces have had to carry the greater part of the burden of planning our defenses, and they have had to do this without any clear declaration of policy on the part of the political branches of the Government (President and Congress).

Yet it may not be said that some fairly respectable peacetime planning and legislation have not been effected. The National Defense Act of 1916 certainly deserves mention. It was the main feature of our "preparedness" program prior to our European adventure of 1917-18. Following that war, the country was again divided on the question of a military establishment. There were many fine pacifists of the type of Jane Addams, there were extreme militarists of the Prussian variety, and there were varieties between these extremes. But the professional soldiers, the administrators, and the military affairs committees of Congress evolved a compromise plan which was embodied in a notable piece of legislation, the National Defense Act of 1920. It provided for a standing army, which might be expanded as the national defense might require, the organized reserves, and the Reserve Officers' Training Corps and the Civilians' Military Training Corps. It organized the United States into corps areas. And it established the principle of mobilization as against volunteering and the principle of industrial mobilization.

Congress and the Navy. The United States Navy has not been the victim of "politics" to the extent the Army has. As pointed out in the preceding section of this chapter, its place in the national defense has generally been appreciated. Yet our reliance on the British Navy as a part of our defense force in the Atlantic and our failure, for at least a decade, to notice that we might be the losers in a program for the limitation of naval armaments brought us up to 1933 with a Navy far from first class. That year found another Roosevelt, another Roosevelt who loved navies, in the White House, and Congress responded to his demands to enlarge and strengthen the Navy. In 1940, in response to the fall of France and the

fear that Britain might be overcome and her Navy turned against us, Congress authorized the construction of a two-ocean Navy, the Navy we might have had years before had we followed the construction program begun during the First World War. Although it may be said that Congress and the President must carry a large share of the blame for any lack of preparedness, either military or naval, it should also be said that the professional soldiers and sailors have a share of the blame. They have often been accused of planning for the "last war," of overlooking the possibilities of such instruments as tanks and planes in future wars. In particular have the "battleship admirals," discounting the importance of planes and their carriers, come in for criticism. It is for information on such matters that the political departments of the Government look to the experts, and if the experts are "one war behind" we can hardly expect Congress to bridge the gap.

How wars are declared. Up to this point attention has been directed to the manner in which the President and Congress deal with the problem of peacetime preparation for war. What is the story when war is at hand? Who declares war? The Constitution clearly confers that authority upon Congress. But as a matter of fact the President has much more to do with it than Congress. He is in a position to force the hand of Congress. He may, as Commander-in-Chief, order troops to occupy disputed territory, as did President Polk, and when they are fired upon by opposing forces, announce to Congress that war exists. Or he may, as did President McKinley, send a battleship into "troubled waters" where it might be sunk (or sink from internal causes), with the result that war becomes inevitable. More important, the President, through his control of foreign relations, has the power, not perhaps to lead the country into war or away from war, but certainly to "graze the edge of war," to steer us about its treacherous sinuosities, and, subject to the unpredictable acts of probable enemies, to pick the spot and time at which we might enter. Our entrance into both the First and the Second World Wars was largely determined by the respective foreign policies of Presidents Woodrow Wilson and Franklin D. Roosevelt. It is true that Congress has declared war in all of the cases mentioned, but that was only a detail and not even that in the case of the declaration against Japan after its attack on Pearl Harbor. So much for the relative parts of President and Congress in deciding upon war. What of their parts in its prosecution?

The President as Commander-in-Chief. As Commander-in-Chief of the Army and Navy the President might take the field and assume direct charge of military operations, as did many kings, ancient and mediaeval, and the Emperor Napoleon. Washington did in fact take the field to suppress the Whiskey Rebellion, but other Presidents have wisely stayed at the seat of Government. Lincoln, exasperated with his slow-moving generals, did issue some strictly military orders, but he regretted doing so

and refrained from issuing more after Grant took command of the Union forces. Doubtless some of the Presidents have entertained some notion that they were military strategists and they may have exerted influence in this direction, but, with the exceptions noted, they have left military orders to the generals. Jefferson Davis was a trained soldier, and once he gave Lee a military order—to which the latter replied with the tender of his sword. No important questions have arisen over the President's purely military powers—he seldom, if ever, exercises them. But controversies have raged around his use of his powers as Chief Executive and Commander-in-Chief to determine broad questions of war policy and to regiment the life of the nation.

During the period of the war between the states responsible men did not scruple to call President Lincoln “absolute,” “uncontrollable,” “tyrant,” “usurper,” and “despot.” Why? Because Lincoln, upon his inauguration, finding no plans for saving the imperiled Union, took such action as he deemed necessary to save it. He did not wait for Congress to legislate. In fact, he did not call Congress into special session until ten weeks after the fall of Fort Sumter. He reasoned that as Chief Executive and Commander-in-Chief he had the duty and he ought to have the power to take any action against forces hostile to the United States. He embodied the militia into a volunteer army, added thousands of men to the regular Army and to the Navy, incurred for the United States a debt of a quarter of a billion dollars (a very large sum in those days), paid money from the Treasury to persons unauthorized to receive it, excluded “treasonable correspondence” from the mails, ordered a blockade of Southern ports, suspended the writ of habeas corpus, and detained under military guard persons suspected of treasonable acts or of contemplating such acts—“and all of this,” writes Professor E. S. Corwin, “either without one whit of statutory authority or with the merest figment thereof.”⁴ Congress and the courts (the latter with some reservations) later approved these acts of the President, and the Commander-in-Chief was thus encouraged to issue other orders and proclamations for which there was no clear authority in the statutes.

Congress did not abdicate, however. It voted the money, called up the men necessary to prosecute the war, and concerned itself with various other phases of the war. It was outspoken and critical of the generals, as it had a right to be. Congressmen expressed contempt for “what seemed the over-careful methods of the so-called West Point plan of conducting the war,” and they argued, in language that has a familiar ring today, that the war could be ended by fighting and *only* by fighting.⁵ With only a few dissenting votes, Congress created the Committee on the Conduct of

⁴ Corwin, *The President*, p. 157.

⁵ W. W. Pierson, “The Committee on the Conduct of the Civil War,” *American Historical Review* (April, 1918), p. 557.

the War, and this Committee took itself seriously. It invited subordinate officers to give their views of their commanders, extended its inquiries into the plans for military operations, and even made suggestions concerning promotions in the armed forces and proffered its advice on military tactics. Such matters, the committee should have left alone. Yet our judgment of the committee may be less harsh when we recall that from time to time Lincoln felt compelled to interfere in purely military matters and that, if we accept the testimony of some of our most recent historians, the committee did promote energy and speed in the conduct of the war and eliminated some inefficiency by giving publicity to faulty military and political arrangements and transactions.⁶

War powers delegated to the President. In the First World War Wilson followed, as far as they were applicable, the precedents established by Lincoln. But the First World War was something new, a war of populations, not simply a contest of armies. It called not only for soldiers, but also for the complete mobilization of the manpower and resources of the nations involved. Within three months of its outbreak the British Parliament found it necessary to authorize the executive power to conduct the war and regulate the life of civilians without much reference to Parliament. Although the United States was in this war but a short time and it never really touched our shores, Congress found it necessary to follow the example of our European associates and delegate wide powers to the Chief Executive. The Food and Fuel Control Act authorized the President to regulate by license the importation, manufacture, storage, mining, or distribution of necessities; to take over factories, packing houses, pipe lines, mines or other plants; and to exercise similar powers in relation to foods and war materials. Numerous other statutes gave the President far-reaching powers. For example, the Trading with the Enemy Act authorized him to license trade with the enemy, and to censor all communications with foreign countries, and the Espionage Act authorized him to declare unlawful the exportation of certain goods. The powers thus delegated to the President were, in turn, usually redelegated by him to administrative agents serving under his direction. These officers issued in the President's name thousands of orders and regulations relating to every aspect of the war program. Both Lincoln and Wilson exercised "dictatorial" powers, and the difference was only in this: Lincoln used his powers of Commander-in-Chief to the fullest, expecting and receiving the approval of Congress, whereas Wilson was given wide powers by acts of Congress and therefore relied somewhat less than Lincoln upon his authority as Commander-in-Chief.⁷

Governmentally speaking, the Second World War is being conducted much as was the First World War. Congress has again generously dele-

⁶ *Ibid.*, and Herring, *op. cit.*, pp. 127-129.

⁷ Corwin, *The President*, pp. 190-194.

gated powers to the Chief Executive, perhaps more generously than in 1917-1918. He is allowed the widest discretion in the application of the war-power statutes—the War Powers Act of 1941, the War Powers Act of 1942, the Emergency Price Control Act (1942), and others. These acts are elaborated into specific policy first by the President's orders (often themselves grants of wide discretion) to administrative officials, and second by orders promulgated by these officials. A relatively new administrative device called the "directive" (at least the term is new) is frequently used by the President and other high officials to explain, modify, or amplify an order or orders. It is less formal than the administrative order, much easier to prepare, and seems to be more flexible in its uses. It is worth while to notice that the Chief Executive frequently issues executive orders "as President and as Commander-in-Chief." This is a clear indication that he rests his authority not only upon acts of Congress but also, as did Lincoln and Wilson, upon his inherent powers as President.⁸ War demands action, prompt and decisive, on the home front as well as in the field, and legislative bodies were never intended for that purpose. If the President is the head of the government in time of peace he is the nation's "dictator" in time of war—constitutional "dictator" if you like, but "dictator."

Appropriate functions of Congress in the prosecution of war. Yet Congress has to perform fundamental functions in the prosecution of a war. It should not call generals in from the battlefield to quiz them about their plans, or decide where and when an attack should be made, or specify that young men must have at least a year of military training before they are sent to the firing line, or concern itself with other strictly military and executive functions. But it should levy the taxes, vote the appropriations, raise the armed forces, and authorize the manufacture of equipment necessary for carrying on the war. Furthermore, it should enact legislation to mobilize civilians for war work, to provide for an equitable distribution of goods among civilians, and to enact any other legislation necessary to mobilize the men and resources of the nation and to equalize the burden of war. Such legislation should be wide in scope (and it almost invariably is), and should leave the details to be elaborated by executive orders and regulations. And finally, Congress should investigate, expose, and, as far as possible, correct graft, waste, incompetency, and scandals in the conduct of the war.

The 77th Congress (1941-1942) performed some of these functions very well indeed. It appropriated the money; authorized the raising of the men, the construction of the ships, and the manufacture of materials and implements of war; provided, in part, for the mobilization of civilians; and its committees exposed and corrected some profiteering and graft. That Congress did not, however, write adequate tax bills; provide for compulsory purchase of war bonds; or successfully deal with the problems

⁸ Walter, *op. cit.*, p. 51.

of inflation (closely related to taxation and the buying of war bonds), price control, and labor. It did "play politics," and it seems at times to have had its eye more on the election of 1942 than on winning the war. Consequently it came in for a great deal of criticism, some thoughtless and on its face unfair, some well-reasoned and convincing. A large majority of congressmen are schooled in "politics," and they seem incapable of adjusting themselves to the fact that in wartime the vast majority of the people hold the view that the best politics is no politics. Any war-Congress has a difficult place to fill, duties of the gravest responsibility to perform; and any duty it muffs, shirks, or ignores marks a weak spot in its own armor, indeed in the armor of democracy itself.

III. THE WAR DEPARTMENT AND ITS FIGHTING FORCES ⁹

It is already clear that the President stands at the head of the administrative machine which is responsible for the maintenance of our defenses in time of peace and for the direction of military operations in time of war. He may and does consult with his Cabinet, particularly with those members of it who bear a special responsibility for the defense of the country, the Secretary of War and the Secretary of the Navy. Other department heads who must work more or less closely with the Chief Executive in prosecuting a war are the Secretaries of State and of the Treasury and the Attorney General. The President may have important advisers outside of his Cabinet circle, advisers whose opinions and suggestions carry much more weight with him than do those of his Cabinet members. In 1943 it seemed that several officers, including the Director of the Office of War Mobilization, James F. Byrnes, very much an "Assistant President," were much nearer the center of war management than any members of the Cabinet with the possible exception of the Secretaries of the defense departments. Many people did not know that Harry Hopkins held the post of Chairman of the Munitions Assignment Board, but who did not know that he was the President's "Special Assistant" and close adviser? The President is advised and assisted in matters relating to the use of the armed forces by the Chief of Staff to the Commander-in-Chief of the United States Army and Navy. This formidable title is held (November, 1943) by Admiral William D. Leahy. He is not to be confused with the Chief of Staff of the Army, presently to be discussed. Admiral Leahy's duties are undefined, but he has the confidence of the President, and it is presumed that he plays a major part in mapping out war strategy. We turn now to the departments the activities of which the President's Chief

⁹ Boutwell and others, *op. cit.*, Chs. 17 and 19; Commager and others, *op. cit.*, Chs. 5-6; Herring, *op. cit.*, Ch. 4; "The War Department," *Fortune*, January, 1941, p. 38; "The S.O.S.," *Fortune*, September, 1942, p. 67; *United States Governmental Manual*, Summer, 1943, pp. 229-243; *Biennial Report of the Chief of Staff of the United States Army* . . . (released Sept. 8, 1943).

of Staff may have some part in co-ordinating, the Department of War and the Department of the Navy.

The Secretary of War. Although the War Department has other duties (discussed in the chapter on the National Administrative System) its principal responsibilities are those of organizing, training, and maintaining the Army. The Secretary of War is charged with such duties as are required of him by law or may be referred to him by the President. His specific duties include the supervision of all estimates of appropriations for the expenses of the Department; of the procurement of all military supplies; and of all expenditures for the support, transportation, and maintenance of the Army. He is responsible for the execution of the National Defense Act of 1920, for the improvement of weapons, for proper instruction of military personnel, and for discipline and morale in the Army. The Secretary of War is seldom a soldier by profession, although, like Henry L. Stimson, he may have had military experience. It is worthy of comment that at least two great Secretaries of War, Elihu Root and Newton D. Baker, were men whose interest in peace was whole-hearted and who earnestly labored to promote it through international courts and other institutions for the pacific settlement of disputes. The Secretary should be, and usually is, a man of wide administrative experience who is capable of harmonizing civilian interests and military needs. He must interpret the civilian to the soldier and the soldier to the civilian. Aiding the Secretary is an Under Secretary, to whom are delegated responsibilities pertaining to procurement for the Army; an Assistant Secretary, to whom are delegated general administrative duties; and an Assistant Secretary for Air, to whom are delegated duties relating to that arm of the service.

The General Staff. The General Staff, so much needed for the efficient administration of military affairs, was not established until 1903, when Secretary of War Root finally convinced Congress of its importance. The General Staff is charged with the duty of planning for recruiting, mobilizing, organizing, supplying, equipping, and training the Army. It is headed by the Chief of Staff, who is the adviser to the Secretary of War on all military matters. The Secretary is not expected to act contrary to his advice, and if he does not like his military expert he may ask the President to appoint another. A good Chief of Staff should not only work easily with the Secretary of War but he should also know how to deal with committees of Congress, how, for example, to engage their interest with football metaphors should they not be convinced by the maxims of Napoleon or Frederick the Great. In time of peace the Chief of Staff (who always holds the temporary rank of full General) is the Commanding General of the field forces, and he continues in that capacity in war until such time as the President may designate a commanding general.

There are five divisions of the General Staff, as follows: The Personnel Division, commonly called "G-1," the principal duties of which are to

prepare plans and policies for the procurement, classification, assignment, promotion, transfer, retirement, and discharge of all personnel of the Army. It was the planning of this division which, when we were on the brink of the Second World War, made it possible for the selective service system to start functioning with relative ease. The Intelligence Division (G-2) is charged with the responsibility of collecting, evaluating, and disseminating military information for the Army. This division is the Army's listening post, its eyes and ears. "It tunes in on whispering galleries and snoops around keyholes." Among its personnel are such specialists as language experts and readers of cryptograms. The Organization and Training Division (G-3) plans for the organization, training, and operation of the military forces prior to their assignment to regular operating units of the Army. The Supply Division (G-4) has the planning responsibility for such services as the distribution, storage, transportation, repair, and maintenance of supplies for the Army. The Operations Division (no one seems to know why it is not called G-5) makes plans for the use of military forces in the theaters of war, separately or in co-operation with naval forces. It is supposed to have plans to meet any power or combination of powers which might threaten the security of the United States.

In March, 1942, numerous changes were made in the organization of the War Department, and the General Staff was not left untouched. Its basic functions were left unchanged but its personnel was greatly reduced and its organization was simplified and streamlined. The Army Air Forces, having long sought more recognition, were given representation on the General Staff approximately equal to that of the Army Ground Forces. Officers from the Services of Supply join the staff officers of the two great fighting arms, air and ground, in assisting the Chief of Staff in strategical planning.

Up to this point our attention has been directed primarily to the organizations and men who plan and think for the Army, who go to Capitol Hill, to the "legislative front," for men, equipment, and money for the Army. This is not the fighting Army, but only the Army as it functions from Washington, D.C. What of the fighting Army—its organization, its training, its equipment, and its men?

Army Reorganization within the United States: THE SERVICES OF SUPPLY. The reorganization plan referred to above placed all Army activities within this country in three groups: Army Air Forces, Army Ground Forces, and Services of Supply. The task of keeping the Army going from day to day was formerly in the hands of practically independent "arms" units, such as engineering, cavalry, field artillery, and air corps units, and equally go-it-alone "services," such as that of ordnance, chemical warfare, the Surgeon General's office, and the Quartermaster General's office. The late General and columnist, Hugh Johnson, dubbed these units the "Chambered Nautilus." The much-needed reorganization of

March, 1942, did the nautilus to death. To the Services of Supply (S.O.S.) went all of the old services which had to do with feeding, fueling, transporting, healing, and last but not least, arming the Army. Wars are not won by supplies alone, but they are certainly not won without them. Men cannot fight with their hands and on empty stomachs. It takes 35 pounds of supplies per day to keep a soldier properly equipped for fighting. It is estimated that with each armored division which goes across the Atlantic must go 18 tons per man in equipment and supplies. Surely a colossal task is that of the S.O.S., and the boys who jibe, "Mother take down your service flag—your son is in the fighting S.O.S.," show nothing more than good-natured ignorance of what constitutes an Army. The Services of Supply inherited also from the old organization the administrative services (not really a part of the S.O.S.) of the Army: the Adjutant General (a sort of office manager for the War Department), the Provost Marshall (the head of Army Police), the Judge Advocate General (head of Army courts-martial), the Chief of Finance (who pays the soldiers), the Corps of Chaplains, and other services. The new S.O.S. also inherited the nine Service Commands (formerly called Corps Areas) of the United States. It is through the reception centers of these commands that the draftees pass on their way to becoming soldiers.¹⁰

THE ARMY GROUND FORCES AND THE ARMY AIR FORCES. Thus relieved by the S.O.S. of the distraction and effort required by supply, procurement, and general housekeeping duties, the two great fighting arms, the Army Ground Forces and the Army Air Forces, are free to give all of their energies to their primary functions. The mission of the Army Ground Forces is to organize, train, and equip force units for combat service. Specifically it performs such duties as the following: the operation of training centers for infantry, artillery, and cavalry; the operation of schools for all Army Ground Forces; and the training of all tactical units assigned to its forces. The mission of the Army Air Forces is to procure and maintain equipment peculiar to those forces, and to provide air force units properly organized, trained, and equipped for combat operations. It should be observed that while the Air Forces are still under the War Department they are given a status comparable with that of the Army Ground Forces.

Training the soldier. Millions of men must be trained as soldiers if the nation is to win a total war. We entered the First World War with very few trained men, and several months elapsed before Congress passed the draft law. It was more than a year before we were able to make our power felt on the firing line. We were in a slightly better position when we suddenly found ourselves in the Second World War. In 1940, seeing the threat in Europe as the Axis overcame France, Congress passed a selective service act, and the National Guard was called into federal service. Consequently, on the day Pearl Harbor was attacked we had some 1,750,000

¹⁰ *Fortune*, Sept., 1942, p. 67. The S.O.S. is now called the Army Service Forces.

trained and partly trained men. Supplementary selective service acts have made all men between 18 and 65 subject to call for military service, although it was understood that men over 45 would probably not be called for combat training.

Our first year in the war was largely a year of training. More than two million men were sent to the reception and replacement centers, where they were classified, outfitted, and trained. Experienced officers and men from the older units trained the raw troops and the relatively inexperienced reserve officers. In the light of the limited number of experienced men available to train the millions of recruits and the complexities and varieties of equipment and weapons used by modern armies, it may be said that the training proceeded smoothly and quickly. The morale of the trainees remained high, much higher than before Pearl Harbor, and the troops whose training period had ended and who struck at the enemy in Australasia and later in Africa and Europe clearly demonstrated their competence.

A feature of training citizens of a democracy in the art of war which was often overlooked in 1917-1918 received careful attention in the Second World War. The old army training grounds resounded with shouts of criticism, taunts, and jeers. Words of encouragement were seldom spoken, and it took the recruits some time to learn that if they were not being "bawled-out" they were making very satisfactory progress. "Sir, how am I getting along with my assignment?" a citizen-sergeant asked his company commander. "Why, all right," replied his captain in some surprise, "and the instant you are not you will hear plenty from me." This was not the invariable rule of procedure, but it was too common. In the new Army instruction and training proceeds in a more kindly manner. A greater effort is made to encourage the men and the language of the parade grounds has become less violent (albeit less picturesque). Men are urged to think for themselves, to act for themselves. "The American youth is intelligent—he is a reasoning human being," commented a Lieutenant General. "He has exceptional courage and a good sporting attitude—he has lived the life of a free man."¹¹ The General explained that leadership in the modern army depends no less upon men in subordinate ranks than upon leadership in the higher ranks, and he is convinced that the average young American—from the filling station, the shop, and the farm—trained as a free man, has the intelligence and resourcefulness necessary to act on his own when, with his fighting machine, he must operate with a small detachment or finds himself separated from his commander.

Training the fliers. The Army Air Forces have an indispensable part to play in modern warfare, and we have developed the training of these forces along with the training of the Army. Before the end of 1942, tens of thousands of pilots, observers, and bombardiers and hundreds of thou-

¹¹ Quoted in Herring, *op. cit.*, p. 69.

sands of ground men had been trained. There has never been any dearth of candidates for pilot training. It seems that at least half of all college men would "give their eye teeth" for a pilot's commission, and they have submitted themselves to the rigorous training without a whimper. After having met the most exacting physical tests they spend months in classrooms, laboratories, hangars, and machine shops. Finally the successful candidates get their wings and are assigned to units, with much remaining to be learned. Eventually they are ready to cover the landing of our troops, to protect them from the aircraft of the enemy, to engage the enemy's fighting planes, and to "soften up" his home front by bombarding his railroads and his industrial establishments.

Combat organization. Bored with training and "spoiling" for action the soldier of any branch of the service will one day find himself one of 200,000, or 500,000, or 1,000,000 men facing the task of routing the forces of the enemy in a particular area. He has his place in a great army in the theater of operations. The squad is a part of a section, led by a sergeant, and the section is a part of a platoon led by a lieutenant. Above the platoons is the company, commanded by a captain. The company is the basic military unit, and in it the soldier lives his life. It is the military "family," and occasionally a soldier finds that his captain is not unlike a stern, exacting, but just father. After months of association in training and in the field the officers and men of a company usually take great pride in their "outfit"—develop a very high morale which works wonders for them and bodes no good for the enemy. Several companies form a battalion, commanded by a lieutenant colonel or a major. Above the battalion is the regiment, a very important administrative and tactical unit, commanded by a colonel. The brigade is composed of two or more regiments, and is commanded by a brigadier (one star) general. The organizations described are essentially the same in all arms and services, although their names differ somewhat in the several services.

The basic large unit is the division, commanded by a major (two stars) general. It combines various types of fighting units and certain troops of other arms and services, and it is therefore a complete unit. There are three types of infantry divisions—the square division (the First World War type), built around two brigades of infantry, the modern triangular (streamlined) division, built around three infantry regiments, and the motorized division which is essentially the same as the triangular division except that it takes the men up to the firing line in motor vehicles. The motorized division carries out the maxim of a dashing Confederate cavalry leader that battles are won by the leader "who gits thar fustest with the mostest men"—just the opposite of too few and too late! Infantry is the main fighting force of these divisions, but each of the three types contain regiments or brigades of field artillery and engineers. The cavalry division still functions, although it makes considerable use of armored cars

and other motor vehicles. The armored division has taken a leading place in combat. Its striking force is the tank. Terrifying and devastating as these fire-spitting monsters are, they cannot operate alone; each armored division must have its supporting infantry and artillery troops to consolidate and hold the ground taken by the tanks. Not only does the armored division require the aid of other arms of the service which are attached to it, but it also needs the support of whole infantry divisions, particularly the motorized divisions. The tanks break through the lines of the enemy, but the all-important tasks of "cleaning up" pockets of the enemy and holding the gains made are primarily infantry assignments. When we entered the Second World War we were very deficient in armored and motorized forces, a deficiency which we made considerable progress in overcoming during 1942.

An army corps, usually commanded by a lieutenant (three stars) general, is composed of several divisions of varying types and such other units as may be assigned to it. Above the army corps is the field army, commanded by a general (four stars) or a lieutenant general, and composed of a variable number of army corps and other units. A great military force might consist of a group of field armies, commanded by a general.¹² The commander of a field army or of a group of field armies is carrying out the orders given him by the President of the United States through the War Department. Although the commanding general has a wide range of discretion he is in constant communication with the President and the military experts in Washington, D.C. He is assisted by a field staff organized along the same lines as the General Staff described above. Indeed, every officer commanding a unit larger than a company has a staff.

How does a general in the field command an army of 2,000,000 men? The answer is relatively simple. He gives his orders to a few men about him. His staff prepares and transmits the order to the field armies; each commander of a field army gives his order for his staff to pass on to the corps commanders; and so on until the order of the commanding general is passed to the private in the ranks. This is called "the chain of command," and it may explain why privates and non-commissioned officers are sometimes more at ease than their officers when a colonel or general appears to be displeased with the performance of a company.

No land operation against an enemy would be possible without the air forces. They have their batteries (which correspond to the company organization in the infantry), squadrons (battalions), groups (regiments), and wings (brigades). A general officer is designated to command the entire air force in the theater of operations. Thus, in the fall of 1942, when

¹² The strength of the various units named above is approximately as follows: group of field armies, any number above 400,000 or 500,000; field army, 200,000-400,000; army corps, 65,000-90,000; division (square), 17,000-20,000, (triangular), 15,500, (cavalry), 10,000; brigade, 3,400-6,900; regiment, 800-3,700; battalion, 128-1,250; company, 12-700.

our offensive in north Africa was launched, the command of the air forces was given to Major General James H. Doolittle, who was subject only to the orders of Lieutenant General Dwight D. Eisenhower, commander of the entire attacking force. Some of the air force units are primarily for purposes of bombardment, others for pursuit and air fighting, others are for observation and reconnaissance, and still others are employed to transport men and emergency supplies. Who has not heard of the parachute troops who, armed with effective weapons and carrying light equipment, are dropped over the enemy's country to seize landing fields and other strategic points and to that extent clear the way for advancing ground troops? Bombing planes, even when acting alone, are capable of spreading havoc hundreds of miles behind the enemy's lines, blasting his industrial establishments and burning his cities; but it is in co-operation with the ground forces that the air forces score their most significant triumphs. They must do the long distance scouting for the army, clear the sky of enemy planes (or at least establish superiority over them), and rush men and supplies to isolated ground units. Co-ordination of the air and ground forces is the key to any successful military operation. It should be said also that co-ordination of all the fighting forces, land, sea, and air, is indispensable to victory in war. Of this more will be said later, after we have had a look at the organization and equipment of the Navy.

IV. THE DEPARTMENT OF THE NAVY AND ITS SHIPS AND SAILORS ¹³

The organization of the department. Every schoolboy knows that the President is the Commander-in-Chief of the Navy and that the Department of the Navy is headed by a civilian Secretary. The other principal civilian officers of the department are the Under Secretary of the Navy and two Assistant Secretaries of the Navy, one of whom has general administrative control over naval aviation. The activities of the department are carried on largely through offices and bureaus, headed invariably by naval officers. The offices include those of Budget and Reports, Public Relations, Procurement and Material, and that of Judge Advocate General of the Navy. The Bureaus, each of which unfortunately is practically an independent administrative unit, are as follows: Personnel, Ordnance, Aeronautics, Ships, Yards and Docks, Supplies and Accounts, and Medicine and Surgery. Administered by the Department of the Navy also is the Marine Corps, known from the "halls of Montezuma to the shores of Tripoli." In time of war the United States Coast Guard likewise functions under the Department of the Navy. The Coast Guard is the fed-

¹³ Boutwell and others, *op. cit.*, Ch. 18; Commager and others, *op. cit.*, Ch. 4; *Fortune*, "The Navy and the Navy," August, 1942, p. 67; *U.S. Government Manual*, Summer, 1943, pp. 267-296.

eral maritime police, and its functions as such include maritime law enforcement, saving and protecting life and property, establishing and maintaining lighthouses, radio beacons, radio direction-finder stations, and buoys, and making preparations for national defense.

The Office of the Commander-in-Chief, United States Fleet, and Chief of Naval Operations calls for special attention. The duties of this office devolve upon an admiral (four stars) who is the principal naval adviser to the President and to the Secretary of the Navy. As Commander-in-Chief of the Fleet he is under the general direction of the Secretary of the Navy and directly responsible to the President. He is the senior Navy member of the Joint Army and Navy Board and he directs the Office of Naval Intelligence. His other duties include the operation of the Communication Service, naval districts, vessels assigned to the Naval Reserve, mines and mining, and the Marine Corps and the Coast Guard when those services are functioning with the Navy. As the Chief of Naval Operations he coordinates all repairs and alterations of vessels and the supply of personnel and material to insure the readiness of the fleet for action. He advises the Secretary in regard to the design of ships, the location of naval stations and naval yards, fuel reservations and depots, and numerous other matters. These are a few of his duties. It is obviously impossible for one man to discharge them. He is assisted by a staff somewhat similar to the General Staff of the Army and he utilizes the facilities of the bureaus and offices mentioned above. As has since become all too obvious, it cannot be said that the top naval officers in Washington planned with imagination, vision, and foresight to meet the problems which faced the Navy in 1942.

Training the sailors. As West Point trains the generals and other officers for the Army, so Annapolis trains the admirals and other officers for the Navy. Again like the Army, the Navy has schools in which reserve officers are trained and, like the Army, it must rely heavily upon them in time of war. Enlisted men get their basic training in well-equipped naval school systems at Newport, Rhode Island; Great Lakes, Illinois; and San Diego, California. To train the hundreds of thousands of men needed in time of war many other training stations are established. Of course the final training is received aboard ship. Men who show the necessary aptitude are trained in electricity, radio marine engineering, and stores of other trades. Modern ships are full of mechanical equipment, and they require a diversity of specialists to operate them not found in the ordinary industrial establishment. The Navy has been able to rely upon enlistment for its personnel, and its morale seldom leaves anything to be desired. The marines are trained at Parris Island, South Carolina; Quantico, Virginia; and San Diego, California. Their morale is as high as that of the sailors for whom they do guard duty and to whom they look for "housekeeping" services such as medicine and surgery and religion (chaplains).

The Navy's "housekeeping" services. A considerable number of the

officers and men of the Navy are busily occupied with land duties, a fact which may have prompted the line of a song, "The admiral almost never goes to sea!" Many services for men and ships must be performed on land or in port. The United States and its territories are divided into sixteen naval districts, each administered by a rear (two stars) admiral. Each district serves as the geographical unit for patrols and the defense of coastal waters and for such activities as recruiting personnel and purchasing and inspecting supplies and materials needed by the Navy.

The Navy must have bases—repair bases, operating bases, aviation bases, and submarine bases. The great harbors, sheltered from storms and strongly fortified, from which the fleet steams to attack and repel an enemy are called fleet-operating bases. Pearl Harbor is one such base; Guantánamo Bay, Cuba, covering the Atlantic approaches to the Panama Canal, is another. During war, operating bases are likely to be targets (for example, Pearl Harbor) of the enemy, and they may lack the facilities for the repair and maintenance of ships. For these purposes repair bases, commonly called naval yards, are located at various points. At Portsmouth, New Hampshire, submarines are constructed and repaired; at Charleston, South Carolina, destroyers and cruisers are repaired; at Washington, D.C., big naval guns are made; and at New York, Philadelphia, Norfolk, Virginia, Mare Island, California, and Bremerton, Washington, great navy yards perform any service for a ship from bottom-scraping and painting to the construction of the most formidable battleships. Other yards are operated by the Navy, and when war comes, numerous private shipyards are available for full-time work for the Navy.

The Navy's ships. The Navy must fire destructive quantities of explosives (shells, torpedoes, and bombs) upon the enemy's ships and land installations. These messengers of death and destruction are sped on their way from ships, submarines, and aircraft. The battleship, the most powerful of the fighting ships "packs a terrific wallop," its nine 16-inch guns belching out some ten tons of steel and explosives at less than sixty-second intervals. This ship also carries a number of 5-inch guns, "pom-poms," and machine guns. It used to be said, even by some admirals, that the battleship was unsinkable; that it need fear nothing except another battleship. This invulnerability is no longer true. They can be sunk by torpedoes released from submarines or airplanes. The aircraft-carrier with its scouting, bombing, and fighter planes is necessary not only to protect the battleship and other units of the fleet, but also to strike quickly at the ships and bases of the enemy. A fleet without several carriers is under a most serious handicap and is courting destruction at the hands of an enemy which has them. The modern navy must fly as well as float! Other vessels without which no fleet can function are the cruisers, destroyers, submarines, and motor torpedo craft. In wartime battleships at sea are protected by two screens—destroyers and light cruisers. Some dis-

tance in front of the fleet heavy destroyers comb the sea, and large patrol bombers patrol the sky. These are the units of the combat fleet, but the fleet must be served by many ships which do little or no fighting. Tankers (fuel), food and supply ships, mine-sweepers, hospital ships, and repair ships fall into this group.

It has already been mentioned that the professional Commander-in-Chief of the United States Fleet is an Admiral who spends most of his time with the Navy Department in Washington, D.C. The fleet is divided into several combat units, each commanded by a vice admiral or rear admiral, who is subject to the orders of the Washington admiral. The Atlantic Fleet operates from the East coast of the United States, and in the Second World War it has co-operated with the British naval forces in guarding the movements of troops, fuel, food, and other supplies across the Atlantic. In November, 1942, units of this fleet combined with the British Navy to land our troops in North Africa. The Pacific Fleet has its principal base at Pearl Harbor. Commanders of naval forces operating in the Pacific take orders from and report to the admiral at Pearl Harbor. Naval units also operate in Central American waters and in other areas in which it is desirable to make our sea power felt. As a matter of fact, in the Second World War, it is highly desirable to make this power felt in the seven seas, a stupendous task for which we were not equipped in the first stages of the struggle.

The Navy's task. The Navy has the responsibility for preventing the enemy from landing on our shores, for destroying his ships of war, for closing the oceans to his commerce, for keeping open the lanes of commerce for ourselves and our allies, and for protecting our troops and supplies from enemy action on the high seas. A powerful Navy, the kind we expect to have in 1945 or 1946, can do all these things. In the meantime, but not without great loss, we can probably prevent the enemy from landing on the shores of the United States, whittle down his sea power in engagements here and there, rather effectively stop his ocean-borne commerce outside the relatively small area in which his navy can operate, and at the same time can probably protect our supply lines for our troops fighting in Australia, Africa, and Europe. In part because our naval strength was weak in the Pacific we lost our most important source of supply for rubber and tin, and because we did not have enough ships to protect our Latin American trade we had shortages of products formerly imported in large quantities from those countries. A Navy capable of dealing devastating blows in several seas at the same time could not only serve all of the purposes for which a Navy is intended, but it could, at the same time, serve them with relatively slight loss to itself.

Co-ordination of the fighting forces. From time to time, and even in the midst of war, there has been a separatist tradition and jealousy between the Army and the Navy, and to a lesser extent misunderstanding and fric-

tion between the air forces of the two historic departments on the one hand and the surface (land and sea) forces on the other. When team work of the highest order has been urgently required, commanding admirals and generals, sharing the responsibility for the defense of strategic areas, have been known to regard each other with the gravest suspicion and to give each other the most reluctant co-operation or none at all. Whether in defense or in aggressively seeking contact with the foe it is essential that all arms of the fighting services give each other the closest co-operation to the end that they may strike with the greatest possible force and mathematical precision. It is most encouraging to be able to cite examples of such co-operation and co-ordination.

The battle of Midway of June, 1942, is a case in point. The naval commander had the responsibility of directing the action. The commander of the Army forces served as his "ardent lieutenant." Naval officers' doctrine of "calculated risk" led them to believe that the Japanese, after their setback in the Coral Sea, would strike at Midway. They were right, and the Navy and its supporting forces were ready. Our airplane carriers steamed into position. Marine Corps fighter planes based on Midway met the 200 planes of the Japanese attacking force. The Flying Fortresses of the Army roared in to hit at the enemy ships from high altitudes, Navy dive bombers and torpedo planes raked enemy ships, employing methods the enemy had found so effective against the British battleships the *Repulse* and the *Prince of Wales*. Co-operation and unity of command triumphed and the enemy was forced to retreat.¹⁴

Perhaps a better example of how much can be accomplished by unity of action is furnished by the invasion of Africa in November, 1942, by forces of the United Nations. As early as December, 1941, on the initiative of President Roosevelt, the United States and Great Britain decided upon an invasion of French North Africa. The actual planning was done by the Army and Navy staffs of the two countries. Leaders of the expeditionary force were carefully selected, and troops and supplies were shipped across the Atlantic, most of them destined for England. While the staffs in Washington and with the field forces were making their final plans, the troops in Britain were receiving intensive training. Other invasion troops were receiving their final training in the United States. During all of these months our fleet was busy convoying our troops and supplies. So carefully had the plans been made that when the time arrived for the operation, the many complex parts of the military machine started with the apparent simplicity of a mechanical mechanism when the switch is thrown. Soldiers and supplies left many different ports in the United States and Britain and, protected by warships of these two powers, arrived simultaneously at five or six destinations. Since the British Navy furnished the greater number of ships for the attack on the African coast, the

¹⁴ *Fortune*, August, 1942, p. 67.

commander of the American fleet was made subject to the orders of a British admiral. Thus, there was unity of naval command. The attacking ground troops were principally American, and, of course, commanded by an American officer, General Eisenhower. Serving under the commanding general was Major General Doolittle, who directed the Air Forces.

In the attack the interplay of co-operation among the American Army, Navy, and Air Forces, the British Navy, and the Royal Air Force marked a high point in the strategy of the United Nations. Battleships softened up shore batteries and covered landing parties. Their guns and dive bombers fought off attacking ships and smacked tough spots along the shore. An umbrella of planes shielded the special landing barges which were pouring troops, tanks, armored trucks, and other equipment ashore. The Air Forces picked up parachute troops in England, flew them for eight hours, and delivered them at the right moment for the attack. These troops took over tough spots as the tank and ground troops moved in. Planes settled down upon the fields and began operating from them. In at least one case the co-operation was so close that the planes strafed an airfield and helped ground fighters to take over.¹⁵ This was an American-made blitz, which we had learned from the German successes and the mistakes of the United Nations. A campaign was won and ultimate victory seemed this side of the horizon.

Political co-ordination. This same North African campaign illustrates the effective use of politics for the attainment of military victory. Since the territory we were about to invade was under the nominal jurisdiction of Vichy France, President Roosevelt spoke (in French by short-wave transcription) to the people of France and French Africa. "We come among you to repulse the cruel invaders. . . . Have faith in our words. . . . Help us where you are able. . . . *Vive la France!*" About the same time the President was addressing the French, he sent messages explaining our high purpose to Spain and Portugal, assurances which seemed to be entirely satisfactory to those countries. Looking a little further into the future, to the time when our armies would invade Southern Europe, our government removed Italians residing in this country from the class of enemy aliens, and Assistant Secretary of State Adolf A. Berle addressed Italian anti-Fascists in the United States and the people of Italy as follows: "To those true patriots who undertake the liberation of Italy, we say, you do not act alone. The armies of America and the United Nations are close at hand." Some of the Vichy forces in Africa did not resist the Americans, others offered only a token resistance, and soon the entire French African Army came over to our side. Not only did the American planners make telling appeals to the French, the Spanish, and the Portuguese, but they also gave careful attention to the manner in which the

¹⁵ *United States News*, November 20, 1942.

natives of Africa should be approached. And when North Africa fell into our hands, the President announced that the peoples in countries occupied by American armed forces would be fed. This was in striking contrast to Nazi practice, and there is no doubt that such news had its effect in countries under Nazi domination and in Italy which, although nominally a German ally, was occupied by German forces. This is political warfare, the kind of warfare that softens up the enemy before a shot has been fired, causes subject peoples to commit sabotage and plan revolts, and brings wavering peoples to our side.

V. WAR ECONOMY ¹⁶

The task of production. Modern war requires the mobilization of the entire nation. In the eighteenth century an army of a few thousand volunteers carrying muskets could be fairly well supplied from the normal output of a nation's factories and shops and the great majority of the population went about its "business as usual." The large conscript armies of Napoleon did, to a considerable extent, disrupt the economy of the French nation, but so simple were the equipment and weapons of those days that one worker was able to supply two soldiers. The First World War, the first war in which machines played an important part, required five workers for every soldier. So rapidly have the machines of destruction been developed, particularly the planes and tanks, that in 1942 sixteen workers are needed to keep one soldier in the field. Men and women who operate lathes, drill presses, planers, saws, tractors, combines, steam shovels, and scores of other machines and instruments in the factories and on the farms are as indispensable in war as the soldiers at the front. No nation can win in the theater of military operations until it wins the war of production on the home front. To win this type of war calls for materials, manpower, organization, inventiveness, and mass production.

One might thoughtlessly say that America has all of these things in greater abundance than any other nation and that she can therefore easily solve the production problem. But even the truth in the first half of the statement is misleading. We are very much dependent upon imports for certain raw materials, and some of these, rubber, for example, have been to a large extent or entirely cut off by our enemies. Furthermore, abundant as our domestic supply of raw materials is, the demands for them are so great that our resources for extracting them from the earth, forests, and fields are severely taxed. As for manpower, it is true that we have a working population of nearly 50,000,000, a number several million in excess

¹⁶ Jane Perry Clark Carey, "Labor Laws and War Production in the United States," *Political Science Quarterly*, LVIII, 25 (March, 1943); Commager and others, *op. cit.*, Chs. 8-11; Herring, *op. cit.*, Ch. 9; H. W. Spiegel, *The Economics of Total War* (1942); Walter, *op. cit.*, Chs. 1-2.

of the total population of Great Britain, but we have need for a still larger number. Besides, numbers do not tell the whole story. One skilled worker is more valuable than several helpers, and the shortage has been in skilled labor. There is no doubt of the organizing and inventive talents of Americans, and our capacity for mass production is known throughout the world. It takes time, however, to change our plants from the production of peacetime goods, such as automobiles, radios, telephones, electric refrigerators, washing machines, and a thousand other things which make life easy and pleasant, to the fabrication of implements of war, some beautiful, some hideous, all precise and death-dealing. Yet in the "borrowed years" of 1940-1941 we tried at first to get ready for war without seriously disturbing our peacetime economy. We attempted to superimpose our preparedness program on our normal industrial output. The result was not a success. The nation's industry had to lay aside its "business as usual" hopes before it came within striking distance of an armament output which caused any worry in Berlin, Rome, and Tokyo.

THE WAR PRODUCTION BOARD. More than a year before Pearl Harbor the Government was setting up emergency defense agencies charged with the duty of stimulating and co-ordinating the manufacture of weapons and other implements of war. As has already been indicated there was considerable confusion in these days and the going was slow. Shortly after the declarations of war, the President announced that in 1942 there should be produced 60,000 planes, 45,000 tanks, 20,000 anti-aircraft guns, and 8,000,000 dead weight tons of merchant ships, and that 1943 should see a significant improvement over these figures. He established the War Production Board and designated as its head Donald M. Nelson, an able and experienced industrial executive.

Vast indeed were the responsibilities entrusted to this board. Under its control went virtually the entire productive potential of the nation. It was authorized to exercise general direction over the war procurement and production program; to determine the policies and methods of the federal agencies in respect to procurement and production, including purchasing, contracting, plant expansion and its financing, and various other factors; and to perform such other duties as the President may direct. To this board went also the task of administering the priorities system. Under this system is governed both the flow of raw materials and the processing of goods. Orders for strategic materials and goods are given priority ratings, and producers and manufacturers are required to fill such orders before they fill any others. It is obvious that this system would irritate a great many people and there is no doubt that some mistakes are made in administering it, but it should be equally clear that materials could not be conserved for war use without some such system. It was found necessary to restrict greatly the manufacture of goods for civilian use and to close some plants engaged in their manufacture. There are simply not enough

materials to supply the war machine and at the same time to give civilians what they want. Furthermore, many plants engaged in the manufacture of civilian goods were needed for war industries.

At the outbreak of war there were not a sufficient number of plants engaged in the production of munitions and equipment. It was the duty of the W.P.B. to see that factories converted from the production of peacetime goods to the production of war materials and that new war industries plants were constructed and financed. Private capital was slow to invest its money in new munitions plants because, whatever the profits might be in war, they were likely to be nil with the return of peace, and such plants would stand idle and depreciate rapidly. In order to get the needed plants the Government granted several types of aid. Indeed, in the case of those plants which will have no value after the war, the Government has done all the financing, leaving them to be operated by private companies on a fixed-fee basis. Such plants, of course, belong to the Government and will be returned to it at the close of the war. When private industry has built munitions plants it receives payments over a period of five years for its investment. Financing is done through the Reconstruction Finance Corporation.

Mass production wins a war, but before we have planes and tanks rolling off the assembly line we must build the machines necessary for their manufacture. The machines which make automobiles, electric refrigerators, typewriters, and vacuum cleaners will not make airplanes, tanks, shells, and bomb cases. Entirely different machines are required, and when these are built we are well on the road toward mass production. But we have not gone all of the way until we have every possible plant, large and small, feeding the war machine. Ordinarily contracts are let to large firms, and the small firms are brought into the war industries through subcontracting. The contracting firm makes the principal parts of a weapon and subcontracts with ten or twenty or even more small firms for the other parts. It is the job of the large firm to see that the subcontractors keep moving at the right speed with the work which is "farmed-out" to them so that the many parts flow back to the main plant in good time to be joined together into an intricate machine on the assembly line. All of this requires organization and co-operation of the highest order. In making arrangements for mass production American industrialists lead all the worlds, and our assembly lines are no less a threat to our enemies than are our forces which carry the arms fashioned by American industry.

The record of achievement. Production figures for the first war year (1942) approximately reached the almost fantastic goal set by President Roosevelt. The actual achievements with the President's goal set (in parenthesis) beside them were as follows: 49,000 (60,000) planes, 32,000 (45,000) tanks, 17,000 (20,000) anti-aircraft guns, and 8,200,000 (8,000,000) tons of merchant shipping. It was pointed out by the Office of War-

Information that an increasing proportion of planes being built were of the heavy bomber type, and that thousands of essential scout cars and track carriers, in addition to tanks, had been manufactured. On the whole, the year 1943 saw even greater victories on the production front.

The railroads and war industry. The need for ships to get the men and implements of war to the theater of operations is obvious, and our record of ship construction has already been noted. Of no less importance are the railroads. In 1942 their record was little short of miraculous. In the spring of that year the Nazi submarine campaign off the Atlantic coast was a sweeping success, but the railroads prevented it from being a catastrophe. They hauled 900,000 barrels of oil and gas a day from the Southwest to the East when only the most optimistic transportation experts believed they could carry more than 200,000 barrels. By speeding up their trains, by loading their cars more heavily, and by avoiding sending empty cars in opposite directions at the same time the railroads have succeeded to a remarkable degree in hauling the millions of tons of raw materials to the industrial plants and the tens of thousands of heavy machines of war and provisions to the camps and to the ports of embarkation. During the First World War the Government found it necessary to operate the railroads, but the response these carriers made in 1942 seems to indicate that direct Government operation will not be resorted to in this emergency. No doubt one explanation for the present efficiency of the railroads lies in the Office of Defense Transportation, a war agency with wide powers, which are used with keen discretion and judicious restraint by that most capable transportation authority, Joseph B. Eastman.

Organized labor and production. The part of labor in making our war industries hum is, of course, obvious; but the conditions under which labor should perform its work are anything but obvious. To be sure they are clear enough to one extreme group—labor should not be allowed to strike, should be required to work 60 hours a week, be paid not more than five dollars a day, and not be permitted to use the war emergency as a means of strengthening labor unions. On the other extreme we find those who would permit labor to force the closed shop in all war industry, get ever-increasing wages, even with price controls being placed on goods, and otherwise get all it can out of the nation's greatest trial. "Tories" who get blue in the face every time they hear that a skilled worker is getting fifteen dollars a day and "radical labor agitators" who would stop production unless labor gets exactly what it wants both earn severe and equal censure.

A basic difficulty is that organized labor in America is young and, on occasion, guilty of some of the irresponsibility of youth. Another basic difficulty is that the industrialists are old (as compared with organized labor) and tough, fairly certain of the rightness of their position, and, supported by a major segment of the middle class, definitely hostile to any

recognition of labor as a full partner in productive enterprise. In Britain labor and industry have learned to work together without the friction, antagonism, and mutual suspicion and distrust which characterizes their relationships in the United States. Industry accepts organized labor as an established fact, and labor has done rather well in living up to its responsibilities. They are working together to win the war and the output of the war industries in Great Britain is truly remarkable.

THE NATIONAL WAR LABOR BOARD. Upon the declaration of war, labor and industry agreed to co-operate in the interest of maximum production. Industry promised not to use the emergency to take advantage of labor, and labor made a similar pledge to industry and the public, and it specifically agreed not to strike. In return for this co-operation the President established for labor and industry the National War Labor Board, giving it the authority to hear and determine disputes relative to various labor questions, particularly wages. The National Board in Washington keeps its hands on policy and sits as a supreme court to hear appeals from the regional boards, but the latter, of which there are twelve, through their numerous tripartite panels, carry the burden of settling most of the labor-dispute and wage and salary adjustment cases. An essential feature of the organization of the War Labor Board, its regional offices, and the tripartite panels is the equal representation of the public, labor, and industry on each board and panel. The newspaper headlines tell us that the War Labor Board is often ignored and insulted. It has been in a few cases, notably in a coal miners' case. Its successes, however, are much more frequent than its failures. Quiet settlements seldom make the headlines, and the public probably has little appreciation of the degree of success the Board has attained. The Board has stood rather determinedly against rapid increases in wages, and is, therefore, entitled to some credit for slowing up the forces which would cause prices to skyrocket and plunge us into run-away inflation.

The quest for manpower. The more men we have in the armed forces the more men we need in industry which supplies equipment for those forces. It is therefore perfectly clear that as we draw upon able-bodied citizens for both of these services we soon reach a point where the problem of finding a sufficient number of men becomes acute. During the First World War women took the place of men in a number of positions, and we passed through that struggle without experiencing any tragic shortage in labor. The demands of the Second World War are so stupendous that giving a few hundred thousand women jobs commonly held by men will not solve the problem. What is needed is complete control and direction of the manpower (and the womanpower) of the nation. It is folly to take skilled craftsmen from industry and experienced farmers from their farms and put them on the fighting fronts. They can serve much better where they are. Hundreds of thousands of men and women must be found and

trained for places in the war industries. Men and women in industry and on the farms must be required to perform their services just as the members of the armed forces are held to a strict performance of their duties. Workers should not be allowed to roam around looking for jobs which pay a few cents more an hour or to absent themselves from their jobs without leave. In short, total war means that the Government must, in effect, draft the entire able-bodied population of the country.

There are many citizens who whole-heartedly approve the military draft but who strenuously oppose compulsory service for civilians. Actually there is as much reason why civilians should be marked for essential industries and compelled to perform the service as there is for drafting men into the Army. The only strong argument against it is history—it has not been done before. At one time that was also a very strong argument against the draft for military service. It might also be suggested that there is no good reason, except the historical one, why persons serving in industry and on the farm and in other essential production services should not receive the same pay as the personnel of the Army and Navy. The effort of each group is essential and it is not difficult to maintain that the rewards should be the same.

THE WAR MANPOWER COMMISSION. The matter of equal rewards for those who fight and for those who work that others may fight will probably await a war or two for a satisfactory adjustment, but the necessities of the case are compelling the Government to take stock of its civilian manpower and to say who is going to work where, for how long, under what conditions, and at what wages. The Government is forced to train new workers and speed them to the centers where they are most needed. As the manpower shortage becomes greater, men will for all intents and purposes be drafted for various industries and women will be drafted also. In December, 1942, a significant step was taken to grapple with the problem of manpower. By Executive order the War Manpower Commission, which under limited powers had been functioning for seven or eight months, was given authority to control both the employment of war workers and the drafting of men for the fighting services. The Army and Navy were ordered to cease recruiting and to get their men in the future from the Selective Service Bureau, now functioning under the Manpower Commission. The Commission was authorized to direct that the United States Employment Service, one of its adjuncts, be used for the hiring of workers in any occupation or area which the Commission might designate. It was also authorized to channel workers into the most essential jobs from those less essential. This reorganization suggests that the manpower problem is being tackled, and the most hopeful sign is that the problem is viewed as a unit, not as one for the military men to handle in one way and the civilian services in another. It may mark the end of a lack of system under which a good mechanic may be found disgustedly serving as a poor

soldier and a young able-bodied man, who could soon be an excellent soldier, making seventy-five dollars a week trying to serve as a mechanic. It cannot be said, however, that this goal has yet (November, 1943) been achieved.

Rationing and price control. With approximately half of our manpower in the fighting services or on the industrial front processing foods, materials, and weapons to supply those services it is obvious that the goods available for civilian consumption must be greatly reduced. No less obvious are the facts that civilians will rush to purchase the goods which are available, that those who have the most money and the least patriotic restraint will get more than their share of the goods, and that producers and sellers of those goods will reap a rich harvest by advancing prices. In order to prevent these deplorable conditions the Government instituted a system of rationing and price control. Even before the outbreak of war gasoline was rationed to dealers, and in 1942 it was rationed to consumers also, partly to conserve gasoline, partly to solve the transportation problem, but primarily to save automobile tires. Another commodity which was rationed early was sugar, and as the American people and their leaders learned the meaning of total war other goods were rationed in rapid succession. Some volunteer rationing was attempted, but that was only partially successful. Only compulsory rationing is fair—will catch the “chiselers” and “fudgers” who insist upon special privileges and favors in the face of the gravest national emergency.

THE OFFICE OF PRICE ADMINISTRATION. On January 30, 1942, after months of debate, Congress authorized a less than all-out price control system and established the Office of Price Administration as an independent agency. A partial list of the powers of this office is as follows: to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by the war; to assist in securing adequate production of commodities and facilities; and to prevent a post-emergency collapse of values. The rationing program mentioned above was placed under a section of the Office of Price Administration.

Perhaps the most significant action of the Price Administrator was his general price-freezing order of May, 1942. The maximum that could be charged for goods and services, with a number of exceptions, was fixed at the highest price which had prevailed in March. These “ceilings” as everyone knows, were subject to later adjustment. It would seem that the Price Administrator was given the widest powers to cope with prices; but there were serious limits to his authority. He could not control wages and he could not fix a maximum for agricultural prices at a figure lower than 110 per cent of parity, or less than the prevailing market price on December 15, 1942, or less than prices prevailing at two other specified

times. It is clear beyond the peradventure of a doubt that there were at least two very large loop-holes in the price control law.

HALF-HEARTED EFFORTS TO CONTROL INFLATION. The problem of keeping prices down was complicated not only by the inadequacies of the price control act but also by the fact that the national income was much higher than it had ever been, much above the income in the golden days of 1929, and much above any fair value of the goods and services available in 1942. With from \$17,000,000,000 to \$30,000,000,000 more in income than there were things to buy with it, the limited price control system could not prevent a rapid rise in prices—inflation. To prevent inflation under these conditions two requirements are indispensable: a price control system which reaches all essential commodities and wages and a program of taxation and the purchase of war bonds that will absorb all of the national income above the amount needed to buy the goods and services available.

In April, 1942, the President called the attention of Congress to the need for the stabilization of wages and of the prices received by farmers for their products and for higher taxes and an acceleration of the bond-buying program. Congress took no action, and the President, under authority he already possessed, directed the War Labor Board and other administrative agencies dealing with labor to limit the granting of increases to exceptional cases. The Labor Board seemed to make some effort to follow this directive, but the big problems of adequate price control and the absorption of surplus income remained. On September 7 the President asked Congress to pass legislation which would authorize him to stabilize the cost of living, including the authority to fix maximum prices on all farm commodities. "In the event that the Congress should fail to act, and act adequately," threatened the President, "I shall accept the responsibility, and I will act." There was much criticism of the President's "or else" message, particularly of his effort to place the delay in establishing a plan for preventing inflation entirely on Congress.

Nevertheless, Congress, not without some bad feeling, took up the President's proposal. A bill was passed giving him about what he had asked for with the exception that he was directed to give "adequate attention" to farm labor costs in computing farm prices. The President then issued orders stabilizing wages and farm prices, extending rent ceilings to the entire country, and freezing salaries of more than \$5,000 a year. He persuaded the popular and diplomatic Associate Justice of the Supreme Court, James F. Byrnes, to resign that position to accept the new post of Director of Economic Stabilization. Under his direction were placed the heads of all the wartime agencies who must meet the problem of inflation in its various aspects. Some months later, Mr. Byrnes was persuaded to take a still more challenging assignment, that of Director of the Office of War Mobilization, an organization charged with the duty of keeping the civilian economy on an even keel with war production.

What has been done to absorb the surplus dollars? Higher and higher federal taxes have been imposed and the people have been urged, coaxed, entreated, and vamped (by movie actresses) into buying bonds. But in September, 1943, the taxes were still not high enough and the sale of bonds to the American people was far below what it should have been. The money still available for spending was greatly in excess of the value of things which could be bought. Thus the danger of inflation was not averted. In the opinion of many of the most reputable economists that danger can be averted only by a federal tax bill which will hit every resident and hit him hard, taking some \$35,000,000,000 or \$40,000,000,000 of the national income, and by the compulsory purchase of war bonds, taking some \$30,000,000,000 more. On the basis of the national income for 1942, this program would leave in the hands of the people as much money as they had to spend in 1932. We would live, as we did in that year, on a depression level; we would avoid inflation; we would be paying for a large part of this war as we go; the greater part of the debt we incur to carry it on would be in the hands of the American people; and this debt would be repaid to them in the years of peace, when goods and services are again available for purchase.

VI. CIVILIAN DEFENSE ¹⁷

Over and over again we hear that this is a people's war. It most assuredly is in that practically everyone must have a part in waging it and that only the favored few are not within range of enemy guns and bombs. Fortunately the original estimates of the damage and injury which could be caused to civilians by machine guns and bombs from enemy planes were somewhat exaggerated, but the fact remains that civilians are tragically vulnerable. In 1942 men not given to hysteria were convinced that bombs would even fall on strategic areas in this country. A part of the answer to this threat was Civilian Defense.

Civilian defense in the first year of the war. In May, 1942, when we were still in the lease-lend stage of the war, the Office of Civilian Defense was established by executive order. Its declared purposes are as follows: to assure the effective co-operation of the state and local governments with the many phases of the national war program; to facilitate individual participation in that program; and to provide for necessary co-operation among government units for adequate protection of the civilian population. The country was divided into nine regions, each with its regional director. Each state and the cities of New York and Chicago set up offices, and, under the general direction of the states,

¹⁷ Walter, *op. cit.*, Ch. 4 (written by Lashley G. Harvey); C. Lester Walker, "Civilian Defense: There She Stands," *Harper's*, August, 1942, pp. 235-244; *U.S. Government Manual*, Summer, 1943, pp. 71-75.

some ten thousand communities established local defense councils and enrolled approximately 7,000,000 volunteer workers. All of this has been done on a co-operative basis, the national government furnishing most of the advice and suggestions and some of the money, the regional and state headquarters co-ordinating activities in their particular areas, and the local defense councils doing the hard work of training workers and bringing home to every citizen his responsibility for the defense of himself and his neighbors.

During its first year, the Washington Office of Civilian Defense was often criticized and ridiculed because some of its civilian morale-building programs were inclined toward the frivolous, suggesting that they were under the direction of Gilbert and Sullivan. Even after the office discontinued the activities which brought it the greatest criticism it was still looked upon with suspicion and harassed by Congress. The O.C.D. had at least one other handicap—it possessed very little authority to command; it had to do its work largely by securing the voluntary co-operation of the states and the local communities. Nevertheless, since February, 1942, O.C.D. has given a good account of itself.

Cities and towns along the coasts and in the areas of the war industries have, in general, sought to prepare for the day when they might be raided by the enemy. Air raid wardens, auxiliary firemen, auxiliary policemen, utilities repairmen, rescue squads, nurses' aids, road repair crews, demolition and clearance crews, drivers, messengers, and others have been recruited and trained (in part) for the emergency which all fervently hope will never arise. Poor leadership and political squabbles have prevented some cities which are, from the enemy's standpoint, important military targets from setting up adequate defense systems, and it is quite understandable that cities far removed from the coastal areas have been slow to take precautions. It must be admitted, too, that in some small communities civilian defense may be over-organized, and that some of the exercises the defense units have set themselves in preparation for calamity are tributes to the ingenuity and energy of co-ordinators and chiefs of units rather than to any fear of enemy bombs. But there can hardly be too much civilian defense. Preparation is a form of insurance, and our problem is not how to avoid too much of it, but how to provide enough. As the first year of the war passed with no bombs falling on any of our cities, there was widespread evidence that volunteer civilian defense workers were losing interest and dropping out of their units. Co-ordinators have been heard to say, half seriously, that they wished a few bombs might fall, certain that this act of hostility would fill the ranks of volunteer workers. It is contrary to human nature for volunteers to continue on the alert for months when no alarm sounds the approach of the enemy. Perhaps the solution is to be found in the employment of a few paid workers who can

maintain a skeleton organization, conduct inspections, and give orders. Then, if the need arises, volunteer workers will quickly fill the ranks.

Later phases of civilian defense. As the sense of security from bombing attack has grown and as the O.C.D. has had time to organize for other functions, the emphasis has been shifted somewhat from passive defense to the promotion of activities which belong in the category of conservation. Workers have been organized and trained to carry out community activities in the fields of health, nutrition, consumer interests, housing, recreation, education, child care, and to perform such other duties as the local war conditions may demand. The civilian population, including boys and girls in many communities, has been organized to assist federal agencies in carrying out their war programs. The "save the grease," "share the meat," and "collect the scrap" campaigns are examples of this type of work in the fields of salvage. Civilian groups also participate in the conservation of transportation facilities, in the sale of war bonds and stamps, and in agricultural production.

The O.C.D. is directed to integrate the work of nine other federal agencies in safeguarding communications; air commerce; train and motor transportation; forest, mineral and grass lands; gas utilities; domestic water supply; and foodstuffs, fibers, naval stores, and vegetable oils. The office also operates a volunteer corps of civil aviation personnel for the performance of wartime tasks. This corps performs important missions, such as coastal patrol, messenger service, towing of anti-aircraft gunnery targets, flights for the training of personnel operating aircraft detection devices and searchlights, and search for missing aircraft. Such services represent a direct contribution to the war program, for they free Army and Navy planes for direct contact with the enemy.

Civilian defense, then, is not an appropriate subject for jokes and gibes. It is true that some false starts were made and that there were civilian defense projects which might be characterized as silly; but with so much to be done in a great hurry mistakes were inevitable. There is no doubt that civilian organizations in the majority of American cities would help immeasurably in absorbing the shock of an enemy bombing, and that these same organizations have given indispensable assistance in the promotion of the war conservation programs. Furthermore, training in first aid, nurses' aid, fire fighting, police protection, and, in fact, in any one of at least a dozen branches of civilian defense represents a minimum of practical knowledge which will serve any of us well in peace or war. Nor should we omit from the credit side of the ledger the sense of civic responsibility which civilian defense has awakened in the minds of millions of citizens. Thus civilian defense promotes protection, conservation, and democracy.

VII. PROPAGANDA AND MORALE ¹⁸

The requirements of total war are not filled by enlisting and training men, producing materials, or even by the perfection of every variety of physical defense and attack. Total war is for the control of minds no less than for the control of physical forces. A nation must put its own people, military and civilian alike, in the proper frame of mind to enable them to wage war successfully; and, at the same time, must seek to confuse the enemy, to divide his inhabitants, to cause them to weaken their faith, to lose hope for their cause. A nation whose population believes in its cause, has faith in its leadership, and confidence in its fighting forces, will have a very high morale, will put everything it has into fighting a war, and will surprise even itself in developing production, perfecting old processes, and discovering new methods. A nation which has lost or is losing faith, confidence, and hope will have a low morale and may be brought to military disaster by a physically inferior power. Consequently nations at war seek industriously to build up the morale of their own people and with equal zeal strive to tear down the morale of enemy armies and populations. This war for the minds of men is called psychological warfare.

Psychological warfare. The Germans under the Nazis have developed this system of psychological warfare along with and as an integral part of their military warfare, and they trained as carefully and planned as expertly for the former as for the latter. First, they won the great majority of their own people, especially the young, to an almost fanatical faith in the strength of Germany and the future of the Nazi system. Then by soft, reassuring words, by cajolery, by flattery, and by threats they divided and confused the governments and peoples of other countries. This is not the full explanation but it is a significant part of the explanation of why Germany could remilitarize the Rhineland, annex Austria, seize Sudetenland, and dismember Czechoslovakia without firing a shot. The sudden collapse of France was due in large part to effective German propaganda which had deprived France, particularly many of the leaders of France, of the will to fight. The Nazis have conducted psychological warfare in enemy countries, in those which might become enemies, and in those which they never expected to become enemies. They met with considerable success in a number of the Latin American countries and partially succeeded in creating prejudices and dividing opinion in the United States.

Long before this country entered the war, Hitler knew that it was in his path of domination and must be removed from that path. Some of the

¹⁸ H. L. Childs, "Public Information and Opinion," *Am. Pol. Sci. Rev.*, XXXVII, 56 (Feb., 1943); Alex Faulkner, "How Tough is American Censorship?" *Harper's*, Apr. 1943, p. 502; Bernard De Voto, "The Worst Mistake," same, p. 541; Commager and others, *op. cit.*, Chs. 13-14; George Creel, *How We Advertised America* (1920); J. R. Mock and Cedric Larson, *Words that Won the War: The Story of the Committee on Public Information, 1917-1919* (1939).

best brains of Germany were put to work on the subject of how to influence public opinion in America. One of them wrote a book on the subject—*The Art of Influencing the Masses in the United States of America*, a book which revealed that its author knew a great deal about the subject. He explained that Americans could be reached through eight institutions: the church, the educational system, women, the press, radio, motion pictures, industry and labor, and clubs and fraternities. He was careful to point out that Nazi propagandists in the United States must utilize existing Nazi or prototalitarian native American organizations, and it is rather generally believed that the principal success gained by the Nazis in the United States was through the various disgruntled native American groups, the assorted "shirt" and other organizations which were thriving on race prejudice and equally un-American tenets.

The United States is not without experience in spreading propaganda in the enemy country. Indeed, in 1917–1918, President Wilson's addresses and other American documents reaching the Germans had no little effect in bringing about the collapse of Germany on the civilian front when its soldiers were still willing and able to fight. Scholars, publishers, and foreign correspondents are now busily occupied in carrying propaganda to Germany and Italy by shortwave broadcasts and by leaflets dropped from planes. Not only is our propaganda directed at our enemies, but also to our friends and to those whom we hope to have as friends and allies. In particular are our efforts active in Latin American countries, where the Germans were obtaining so much success prior to our entrance into the war. Leaflets, shortwave broadcasts, and other devices emphasizing good intentions, friendly sentiments, and the plans for a better world are powerfully supplemented by the fact of economic power. We can still find money to lend, machinery to export, and food to distribute. Food may win for us many allies against our enemies whose policy it is to seize the food of other nations, not to distribute it among them.

Morale. "They shall not pass." "Praise the Lord and pass the ammunition." "Send us more Japs." That is morale. When soldiers, sailors, marines, and civilians feel that way, given half a chance, they will win a war. That is the morale of the great majority of Americans as this is being written (November, 1943). In 1940 French morale broke under the German attack. British morale, which had not been good, was made by Dunkirk and the Battle of Britain. Neither the Chinese nor the Russians have any idea when they are "licked!" They can "take it" and they "have what it takes." They have the will, the hope, and the faith. They believe in their cause. By all accounts, during this war, Italian morale has been low; that of the Germans and the Japanese high. Let it be emphasized that civilian morale is as important as morale in the armed forces and that it is more difficult to maintain.

During the First World War we went to great lengths to maintain mo-

rale by waving the flag, saluting the flag, preaching hatred of the "Hun," prohibiting the teaching of the German language, and by similar devices. Morale-builders were everywhere a gathering might be found, making impassioned little speeches designed to inflame us against the enemy. The Germans used the same methods to build morale, and they still use some of them. The trouble with such methods is that they are artificial and will not stand up under disaster. In this country we are making considerably less use of such crude methods in this war than we did in the last. It has been charged, however, that not all of the Government's efforts to strengthen our morale have been well-advised. For example, in the summer of 1942, a few of the many heroes of early engagements were paraded through the streets of many cities, to the disgust of some of those heroes and to the regret of many civilians whose morale was good and who thought we had better be giving our attention to the prosecution of the war than to premature celebrations.

Furthermore, it has been claimed that the Government's policy of giving out war information has been unnecessarily restrictive, suggesting that our leaders are afraid to let the people hear unpleasant facts. But there is often good reason for withholding information. An enemy may conduct an air raid or hit a ship. He may not know how successful his air raid was, or whether he sank the ship, and, if so, what ship it was. Should our Government give this information to the enemy? Obviously not; but the enemy would probably get it, if it should be released to our own citizens. There was probably some basis, however, for complaint about the manner in which war information was given, or not given, to the public. The trouble may have been in the number and variety of agencies which were responsible for this function. At any rate, in June, 1942, they were all combined in the Office of War Information and placed under the direction of Elmer Davis. Since then the American people have had more assurance that they will be given any war news which does not help the enemy or which the enemy already has. The facts are positive morale-builders with mature people. Uncertainty produces gossip, guesses, and a strong suspicion that the facts are really worse than they are.

Certainty builds morale. The days of appeasement and anti-appeasement, of "to be or not to be" reduced British morale to a low ebb, and the period of the "phony" war did not materially improve it. But when Britain realized that she stood within the jaws of death, her morale became magnificent. Our own morale was bad before Pearl Harbor, when it immediately jumped to approximately 100 per cent. That piece of treachery stopped debate and dissension. More than that, it made us "hopping mad." Work is a morale-builder, and we have plenty of it to do. Recreation is too, and the President and other responsible officials are determined that much of it shall be retained. Songs and laughter are good for morale. "Heil, heil, right in der Fuehrer's face" is both a horselaugh and a song.

It is the personification of morale. The homely, steady virtues are indispensable to morale. Patience, thoroughness, a knowledge that work is well done are hard to beat. Goodwill and good cheer will enable one to toil serenely at important, routine tasks.

VIII. THE UNITED NATIONS ¹⁹

The "Declaration by the United Nations." The United States of America has many and varied allies in its fight against the Axis powers. On January 1, 1942, twenty-six nations, seven of them represented by "governments in exile," signed a joint declaration in which they pledged themselves to employ their full resources in waging the war and not to make a separate armistice or peace with the enemy. The declaratory powers also accepted the principles of the Atlantic Charter, signed (August 14, 1941) by President Roosevelt and Prime Minister Churchill. This charter announced a broad and generous program for a free world when peace should be attained. As such it might be classified as war propaganda of the highest order, but it was not otherwise related to the conduct of the war. The declaration of union does not of itself bring unity. It took much more than that to make a Union of the thirteen relatively homogeneous British colonies in America, and it will certainly require statesmanship of the highest order to "unite" the United Nations.

Co-operation in the western hemisphere. Yet the United States, the capital of the United Nations for many purposes, has been able to bring about a considerable degree of co-operation, if not of unity, by "a multitude of separate agreements, operated by a variety of agencies and through a diversity of techniques." ²⁰ Nearly two years before the United Nations issued their declaration, the United States and Canada were arriving at a number of arrangements looking to the successful prosecution of the war. Examples of this are furnished by the establishment of the Joint Board on Defense, the Joint Economic Committee, the Materials Co-ordinating Committee, and the Joint War Production Committee. Since the United States entered the war, agreements of a military nature have been easily concluded with Canada, including the arrangement whereby the United States built a road through Canada to Alaska.

Although only a few of the smaller Latin American powers are officially of the group of the United Nations, the United States, capitalizing on its Good Neighbor policy of the past decade, has found it possible to win a fair degree of hemispheric co-operation in the struggle against the Axis. Of particular significance was the Third Meeting (January, 1942) of Ministers of Foreign Affairs of the American Republics at Rio de Janeiro. With

¹⁹ Henri Bonnet, *The United Nations* (1942); Walter, *op. cit.*, Chs. 10-11; "Unified Command" and "Lend-Lease to Date", *Fortune*, October, 1942.

²⁰ Walter, *op. cit.*, p. 199.

the exception of Argentina and Chile the republics made an impressive demonstration of unity, reaching agreement on some forty different topics, including a recommendation that diplomatic relations be broken with the Axis (which recommendation was presently carried out by all of the powers except Argentina), the acceptance of the Good Neighbor policy as a norm of international law of the American nations, and the approval of the Atlantic Charter. Leadership in this conference was supplied primarily by the United States, Mexico, and Brazil. The Mexican Republic not only ardently championed the cause of hemispheric solidarity at this conference, but it also proceeded to grant to the military forces of other American countries the free use of its ports, air fields, and other facilities, and it agreed to the formation of a Joint Mexican-United States Defense Commission.

Political agreements, unless they are specific, may not be of more than moral value. Economic arrangements by their very nature must be specific. The Latin American republics, finding their trade with Europe seriously restricted by the war, and the United States, having need for many of the products of Latin America and the money with which to buy them, found mutual profit in economic agreements. Nor was the United States blind to the fact that its own economic power could be used for the purpose of giving the Axis some uncomfortably tight squeezes in this hemisphere. As early as 1934 the United States established the Import-Export Bank, its main purpose being to promote the exportation of heavy goods to Latin America. When the war caused the loss of European markets to the Southern republics, this country extended loans to stabilize their financial systems, to assist in road-building, and to develop their industries. It is indicative of the semi-military use to which such advances of money may be put that, beginning in April, 1942, the control of these loans was placed under the Board of Economic Warfare. Another example of economic co-operation is found in the "preclusive" purchasing agreements made by the United States with Mexico, Brazil, Argentina, and certain other Latin American countries. Under these agreements the Axis is precluded from buying specified materials and the United States has a virtual monopoly on them.

American and British collaboration. The United States and Great Britain by reason of their long habit of co-operation, the ties of blood and language, and the similarity of their democratic institutions have developed collaboration to a very high degree. Furthermore close co-operation between them is necessary because upon their arms depends victory on the Western European front and in the Far East, and because to them Russia looks for supplies to achieve victory on the Eastern front and from them China must receive arms and munitions to continue her war on Japan.

The efforts of the United States and Great Britain are integrated

through various joint organizations. The one with which the public is most familiar is the Combined Chiefs of Staff group, some reference to which has already been made in discussing the planning of the North African invasion. This group, which sits in Washington, is composed of generals and admirals who head the American staffs and of Englishmen of the same rank who *represent* the British Chiefs of Staff. This arrangement means that the British representatives must be in almost constant communication with their chiefs in London, a situation which is not entirely satisfactory but one which could not be corrected except by a transfer of the British Government to Washington. The Combined Chiefs of Staff prepare and issue joint recommendations to the governments, recommendations which have to do primarily with military strategy.

The war program of the two countries is further co-ordinated by several joint boards. The Munitions Assignment Board was formed under the Combined Chiefs of Staff; indeed so close is the relationship of the two bodies that the same British representatives sit on both boards. The Munitions Assignment Board, sitting in Washington under the presidency of Harry Hopkins, must work in close harmony with all of the joint war agencies and with our own Department of State, the Board of Economic Warfare, the Lend-Lease Administration, and with such allied organizations as the British Supply Council and China Defense Supply. The Board's principal responsibility is to assign war materials to the United Nations. A similar board functions in London. The Combined Raw Materials Board plans the development, expansion, and use of raw material resources under the control of the two governments, and works also with others of the United Nations toward the best utilization of their resources. A Combined Shipping Adjustment Board was set up "to adjust and concert in one harmonious policy" the work of the shipping administrations of the two countries. The Combined Chiefs of Staff endeavor to assure the continuous adjustment and integration of the production programs of the United States and Great Britain to meet the changing military requirements. The Combined Food Board "considers, investigates, and formulates plans with regard to any question relating to the supply, production, transportation, disposal, allocation, or distribution, in or to any part of the world, of foods, agricultural materials from which foods are derived, and equipment and nonfood materials ancillary to the production of such foods and agricultural materials."²¹ It also works with representatives of other United Nations toward the best utilization of their food resources.

Big Four collaboration. As the second year of American participation in the war was drawing to a close, the United Nations won a signal victory—among themselves. Meeting at Moscow, Secretary of State Hull,

²¹ *U.S. Govt. Manual*, Summer, 1943, p. 169.

Foreign Secretary Eden, Commissar of Foreign Affairs Molotov, and China's Ambassador to Russia, Foo Ping-sheung, reached an agreement which only the most sanguine had believed possible.

Although in January, 1943, Britain and the United States had shown a disposition to treat China as a great power by relieving her of her obligations under the extraterritorial agreements, China still had reason to believe that these two powers yet considered her role in the war a minor one and her counsel relatively unimportant. Russia had complained, not without justification, that lend-lease materials were slow in coming; and, in particular, had she vigorously and with pardonable impatience demanded that Britain and America open a "second front," the Western Front, and thus divert an appreciable part of Germany's strength of which for two years Russia had experienced the full force. The two Western powers had been trying in vain to persuade Russia to permit them to establish on her territory bases from which their airmen could more easily reach targets in Eastern Germany and the Balkans, and they had without success sought information on Russian military strategy and technique. The "Anglo-American Front" wanted assurance that Russia would stay in the war, even after she should have driven the Germans from her territory, and Russia wanted to know when they were going to begin their part of the war. In short, there was suspicion and distrust between the allies who were responsible for the Western and Eastern fronts.

In the light of these difficulties the Moscow Agreement (November, 1943) stands as a noteworthy achievement. The United States, Great Britain, Russia, and China declared, among other things, that their united action would continue after the war for the maintenance of peace; that a general international organization would be established at the earliest practicable date; that the four powers, pending the inauguration of a system of general security, would maintain peace, consulting with one another and with the other members of the United Nations in so doing; and that they would co-operate among themselves and the other United Nations to regulate armaments. America, Britain, and Russia reached agreement on the post-war means and extent of control in Germany; on the interest to prevail in the Balkans, where Britain and Russia have great stakes; and on a special council to handle Italian affairs. It is reported also that there was a full exchange of military information among the three powers, and, what was more significant, that the Anglo-Americans and the Russians seemed to have full assurance that neither was concealing anything. Finally, the Moscow Conference made arrangements for continuing its work through semi-permanent agencies.

Within a few weeks after the Moscow Conference President Roosevelt and Prime Minister Churchill, accompanied by other military and political leaders from each of their countries, met with China's General Chiang Kai-shek in Cairo, Egypt. Shortly thereafter Roosevelt and Churchill,

again in company with other military and political leaders, held a similar meeting with Russia's Premier Stalin in Teheran, Iran. At these meetings plans relating to the conduct of the war, terms of surrender for the Axis Nations, and political settlements after the war were discussed at length, and agreements which further implemented the arrangements made previously at the Moscow Conference, were signed. This was victory. Future events will reveal whether or not it was followed up.

The lend-lease policy. It is briefly recorded in the first section of this chapter that the lend-lease policy was undertaken before the United States entered the war, even in the forlorn hope that it might "keep us out of war." Since the fateful December 7, that policy has been continued and expanded into an instrument of military and economic policy, the far-reaching results of which are difficult to estimate. The United Nations and at least a dozen other countries are brought within its benefits. Arms and materials have been sent not only to those countries which are fighting the Axis, but also to any others which might at some future time join the forces of the United Nations. Lend-lease materials include guns, munitions, tanks, aircraft, medical supplies, seed, fertilizer, vegetables, fruit, sugar, meat, and many types of raw materials. The Office of Lend-Lease Administration, in continuous collaboration with the Treasury Department, the Department of Agriculture, the production boards of the defense departments, and the Board of Economic Warfare, allocated supplies to those countries and military areas in which they will contribute the most to strengthening the United Nations' front and help to bring about the economic collapse and military defeat of the Axis.

It is notorious that some of our allies are not convinced that the materials are always judiciously distributed. Russia in particular has complained that the supply allotted to her has been wholly inadequate and that even many of the materials promised have not been sent. Considering the heavy war burden that Russia has carried her complaints are understandable and perhaps reasonable. The main difficulties have been that there were not enough lend-lease materials to go around and that shipping facilities have been inadequate, difficulties which were rapidly overcome at the beginning of 1943.

The lend-lease program is a combination of military, political, and economic warfare. It is the kind of warfare the Nazis have waged with this important difference—the Nazis have used military and political power for the purpose of acquiring for their own use the economic resources of other nations; the lend-lease plan is designed to win through strategic use of our economic resources the political and military support of other nations. The latter policy seems certain to sow fewer seeds of hate, and will probably strengthen our allies and bring us others whom we will not have to keep on our side at the point of the bayonet.

IX. THE INFLUENCE OF WAR ON DEMOCRATIC INSTITUTIONS ²²

War influences the course of practically every type of human institution. Its influence on democracy is of particular concern to all free men and those who are struggling to regain freedom or to become free. It is here proposed to discuss the influence of war and its aftermath upon governmental change, civil rights, and political democracy.

A. War and Governmental Change

Expansion of the executive power. The conduct of war—the control of civilian activities relating to the war program no less than the command of the armed forces—is primarily an executive function. The President as Commander-in-Chief and as Chief Executive has wide constitutional powers, and, at his request, Congress generously supplements these with additional grants of power. All of this was set forth in section II. Our interest now is in what the permanent result of this increase in executive power is likely to be. Many of these powers will terminate with the cessation of hostilities, or soon thereafter. We may be sure also that, following the war, there will be a reaction against the executive power. After the last war the American people by resounding majorities placed Harding and Coolidge in the White House. Both of them played down the President's powers and the rank and file of citizens applauded. Coolidge's reputation for silence and monosyllables made him a national hero. But the reaction against "executive encroachment" comes to an end. President Hoover was much more active than Harding or Coolidge, and the voters knew that he would be; as the nation entered a crisis he was criticized not because he did too much but because he did too little. It seems fair to say that, in the long run, war does add to the sum total of executive power, and that in the next war or other national emergency the powers of the executive will be expanded beyond what they were in the last crisis.

Expansion of the national power. The Constitution gives the national government the war power and it gives it without any qualifications. Therefore that government can manage or control any matter related to the war program, even matters over which the national government normally has little or no authority. There is no question that its war powers give it the authority to control prices, profits, wages, rents, production

²² *The Annals of the American Academy of Pol. and Soc. Sci.*, "Minority Peoples in a Nation at War," vol. 223 (Sept., 1942); Earl Brown, "American Negroes and the War," *Harper's Magazine*, April, 1942, p. 545; Z. Chafee, Jr., *Free Speech in the United States* (1941), Chs. 1-6, 12; R. E. Cushman and others, *The Impact of the War on America* (1942), lecture 1; H. M. Fleming, "The Army's Future Political Power," *Harper's*, July, 1942, p. 212; *Fortune*, "The Negro's War," June, 1942, p. 77; Carey McWilliams, "Moving the West-Coast Japanese," *Harper's*, Sept., 1942, p. 359; Walter, *op. cit.* Chs. 5, 7-8.

(agricultural as well as industrial), rationing, transportation (even to compel an owner of a family car to leave it in his garage or turn it over to the government), communications (even local telephone calls), prostitution (certainly around military and defense areas), and many other situations, conditions, and persons normally exempt from such control. Some of the subjects mentioned are under federal control, or partial control, in peacetime. For example, the interstate commerce power permits such control of transportation and communications which cross state lines. But the war power makes national regulation possible even in local communities. It is true that the states may and do legislate on matters relating to the conduct of war, such as hoarding, profiteering, sedition, and civilian defense, but this is only because the federal government has not completely occupied those fields. In any event, state legislation of this type must be supplementary to and in conformity with national policy. In war the authority of the national government is paramount.

It is not in fixing war policy, but in co-operating in the administration of national war policies that the state and local governments find their significant rôles. Examples of this are readily at hand. The Selective Service Act is, of course, a piece of national legislation, but the Washington administrative office is concerned with little more than serving as a liaison agency between the War and Navy Departments and the general public and as a co-ordinating agency for the various state headquarters. The governor, through a director whom he appoints, enforces the selective service program in each state. At the state headquarters are co-ordinated the work of the various appeal boards, medical advisory boards, local boards, and other selective service units. Incidentally the members of all of these boards serve without pay. "The local boards maintain direct contact with the prospective trainees, their families, and employers. Their power is virtually autonomous and their decision as to a registrant's classification is final except when an appeal is noted."²³ Among the other war functions somewhat similarly administered are those of civilian defense, rationing, and price control. It should be clear that the states and the local communities have their place in the war program not as independent authorities but as co-workers in administration. The general policy and a national headquarters are established by the national government; headquarters with varying degrees of directive authority are set up in each state; and local organizations apply the law and the rules and regulations to individual cases. It develops, then, that there are a number of phases of war administration which are co-operative enterprises, and that the biggest part of the work is done not in Washington but in state capitals, county seats, cities, and villages. This is democracy at work.

Yet it is undeniable that the national government wields its war powers at the partial expense of the states. The states may greatly assist in ad-

²³ *U.S. Govt. Manual*, Summer, 1943, p. 106.

ministering these powers, but the authority remains with the central government; it may delegate to the states much, little, or none of it. With the coming of peace, what are the prospects for a restoration of the powers of the states? The answer is that they are probably good. The end of the war will almost immediately terminate the exercise of some of the national war powers, and demobilization will mark the end of the others. Furthermore, public reaction against the concentration of power in Washington will speed the restoration of powers to the states. After the First World War we had one of our most convinced states' rights presidents, Calvin Coolidge. Yet it must be said that the tendency is toward national control, a tendency which war hastens and which no return to normalcy will check for very long.

Stimulus toward international co-operation. It may be that world wars serve to point the need for better organization in the community of nations. War demonstrates that the harmony of this community has been disrupted; and that each nation pursuing its own selfish policies leads to disaster. During the First World War we heard much of a League to Enforce Peace, a movement in which distinguished Americans took a leading part; and after that war a League of Nations was organized, President Wilson being its chief advocate among the chiefs of state who wrote the Treaty of Versailles. Later we failed the League and the League failed the world. Our responsible leaders were determined, they said, that we should not give up one particle of our sovereignty for an international organization and that we should have nothing to do with Europe's future wars. We retired to our side of the Atlantic, although we repeatedly cast suspicious glances to the other side, often gave it advice, and occasionally sent thither an "unofficial observer." The other great powers were equally determined to give up no sovereignty, to go their own way, although they did not immediately give up the League. But the League was doomed, and so were the nations—to another war, the United States along with the rest of them.

Have the nations learned anything? There are those who say that they have. A few responsible statesmen and many intelligent and public-spirited men and women are determined that after this war we shall establish an international system. The United Nations in war may continue as the United Nations in peace, expanded to include all nations who bring certificates of good character or proof of repentance. This and other proposals we hear made for the solution of the problem of international order. Perhaps no more important or perplexing problem engages the attention of men, and the solutions proposed should receive, even in time of war, the unprejudiced and non-partisan consideration of all citizens.

B. Civil Rights in Time of War

Minority rights. Closely related to minority rights in time of war are the rights of freedom of speech and of the press, discussed in Chapter 5, section II. Minorities in general have a difficult time when the country is in a crisis which calls for unity and when the state of mind of the normal citizen is likely to be such that he is intolerant of minorities even in matters which have little or no relation to the winning of a war. At the time of our entrance into the Second World War, hundreds of thousands of enemy aliens—Italians, Germans, and Japanese—were residing in the United States. Of course it is necessary for a government to keep a close watch on such residents and to place those whose conduct is suspicious where they can do no harm. It has been possible for our Government to deal most liberally with the Italians and the Germans, so liberally indeed that they hardly feel themselves in the class of enemy aliens. Only a few of them have been deprived of their customary liberties.

THE CASE OF THE WEST COAST JAPANESE. The Government felt under the necessity of evacuating the Japanese from the Pacific Coast area, a process in which civil rights and the war power were in conflict and in which, as it usually does, the war power won. The United States Army and Navy were dealt a staggering blow in the Japanese surprise attack on Pearl Harbor. No one can say that it was not the part of prudence to prepare to defend the West Coast from attack. In the zone of coastal operations in California, Oregon, and Washington resided approximately 112,000 Japanese, of whom 41,000 were aliens and 71,000 American citizens. The demagogic pronouncement on all of these people, aliens and citizens alike, was that they were all disloyal to the United States and should be sent to concentration camps. Decent white American citizens, inclined toward moderation, held the view that many, probably the great majority, of these Japanese were loyal. The problem was how to distinguish between the loyal and the disloyal, and it seemed to be insoluble. Consequently, military authorities took what they regarded as the only safe course and evacuated all of them from the Coast. Although such action caused the Japanese the most serious inconvenience, even hardship, it should be said that the Army conducted it in such a way as to reduce hardship to the minimum. Furthermore, as soon as the situation had been clarified, steps were taken to release loyal Americans of Japanese ancestry. It is greatly to be deplored that in some communities in which the evacuated Japanese sought to establish residence, which they had a legal right to establish, the local civilian authorities and what seemed to be the dominant element of the population would not permit them to do so.

THE NEGRO. At the time of great need for men in industry and in the defense forces the Negro finds some obstacles in the way when he offers his services. He is not given an equal chance with white citizens in all

branches of the armed services and he finds even more discrimination against him in private employment. It is true that his Government has attempted, with some success, to rectify these conditions in its armed forces and in those manufacturing establishments which have government contracts for war materials, but the Negro asserts that these efforts are half-way and half-hearted,²⁴ and in this conclusion he is joined by many fair-minded Americans of the Caucasian race. He states, rather convincingly, that his services are more desired as an unskilled laborer than as a craftsman in industry, as a mule driver than as an aviation pilot in the Army, and as a mess attendant than as a gunner in the Navy.

Race prejudice is the answer, and the Government cannot move more rapidly to eradicate it than the population will permit it to move. And let no one say that only the South is determined "to keep the Negro in his place." This determination is probably stronger in the South than in any other quarter, but it exists in any part of the United States in which there is any considerable Negro population. As this war is being waged against external enemies, another war should be waged, and there are stout citizens who are waging it, a war against that most debilitating enemy of democracy, race prejudice. In the meantime, in the hour of his country's peril, the Negro continues "to fight for the right to fight to die."²⁵

THE CONSCIENTIOUS OBJECTOR. For centuries there have been citizens who on religious and other grounds of conscience have refused to participate in war. Many of them have been persons of the highest character. The best known of them are the Quakers who have played a notable part in the development of American institutions and to whose qualities of mind and heart we pay unstinted tribute.

It has been the Anglo-American practice to deal moderately with conscientious objectors. The provision of grace in our Selective Service Act of 1940 exempts from combat training and service any person "who, by reason of religious training and belief, is conscientiously opposed to war in any form." The selective service officials have interpreted this as exempting not only the conscientious objectors who are members of recognized religious sects, but also those who have other moral and philosophical grounds against bearing arms. Under this act, exemptees who are willing to perform non-combatant duty are assigned to medical or other non-combat units of the services. Exemptees who refuse to participate in non-combatant activities are assigned to work of national importance under civilian direction. Such work includes soil conservation, irrigation,

²⁴ Earl Brown, "American Negroes and the War," *Harper's*, April, 1942, p. 545. Some of the Negro leaders are charged with sensationalism, however, by Warren H. Brown, "A Negro Looks at the Negro Press," *Saturday Review of Literature*, December, 19, 1942. V. V. Oak replied to Brown in an article "What About the Negro Press," same, March 6, 1943.

²⁵ These startling words are quoted from Dean Howard Thurman of Howard University, who used them in an address at Reed College, June, 1942.

forestry and wild life protection, rural rehabilitation, and public health service.²⁶ It would appear, then, that the Government is liberal in the provisions it makes for accommodating the relatively few persons who have conscientious scruples against bearing arms.

The majority's obligation to the minorities. The majority must share heavily with the Government the responsibility for the treatment of minorities. Millions of citizens regard as unworthy of the blessings of liberty the conscientious objector whom the Government assigns to non-combatant duty. The Government may grant to Negroes commissions in its armed forces, but it cannot shield from them the knowledge that, in the opinion of too many whites, they are still "just niggers." It all comes to this: individual liberty is what we the people will permit it to be, and the Government is now giving us about all we can stand. The curtailment of civil liberty is one of the tragedies of war on the home front. And the end of the war will not immediately bring about a more liberal public attitude. Rather is it likely to introduce a period in which there will be more intolerance and additional threats to individual liberty. There is this promise and consolation, however: before many years roll around a reaction will set in and we will return to something approximating a "live and let live" society.

Censorship of communications. Related somewhat to the question of the preservation of civil rights in time of war is the problem of censorship. A nation at war must make every effort to keep its enemies from learning of its troop movements, its weapons, its shipping, its losses in men and equipment, or anything else that may enable those enemies more effectively to establish their defense or plan their attacks. Censorship of communications is one of the chief means of preventing information from reaching the adversaries, and it goes without saying that, distasteful as it may be, democratic countries no less than totalitarian regimes must resort to it.

Within a few hours after the Japanese attacked Pearl Harbor, a censorship was placed on cable and wireless communications going from and coming into the United States. Twelve days later, by executive order, the President established the Office of Censorship. Several thousands of men and women located at the principal ports and border cities carefully examine all foreign communications. All communication with enemy countries is prohibited, and cables and letters to and from other countries are examined with care, even suspicious care. The censor must be on the look-out for messages in code as well as for those which are directly expressed. Whenever he finds something suspicious, he passes it on to other officials for further investigation. As might be expected, censorship not only serves as a means whereby we may prevent information from reaching

²⁶ J. W. Masland et al., "Treatment of the Conscientious Objector," *Am. Pol. Sci. Rev.*, XXXVI (Aug., 1942), p. 697.

the enemy but also serves as a means by which we may gain information about the enemy. Communications entering the censor's office may give information of the activities of enemy spies or *saboteurs*. Suspicious items picked out by a censor here and a censor there may, upon being put together in central offices, tell a remarkable story, one which may save American ships and send spies and traitors to their death.

Censorship within the United States is also necessary because, despite the censorship of foreign communications, there are many possible "leaks." An enemy agent might escape from the United States in a plane, send out a message by carrier pigeon, or even get a communication past the censors. Censorship within the United States is on a voluntary basis, however. There are no censors in our schools, churches, fraternal organizations, theaters, broadcasting stations, or press rooms. We may say and write what we please, subject only to prosecution for violating the sedition act. Our two great sources of information, the radio and the press, are naturally of great concern to the Government, but even they are under voluntary censorship. The Office of Censorship sought their co-operation and together with them drafted a voluntary censorship program. The radio and the press are asked not to publish certain types of information except when it is made available through official sources. The restriction applies to various matters relating to troops, ships, planes, fortifications, production, photographs and maps, the weather, and the movements of the President or of other high officials. On the whole the plan has worked satisfactorily. If it should break down, there is little doubt that compulsory censorship would be imposed.²⁷

The Post Office Department is responsible for one kind of censorship which is far from voluntary. Under the provisions of the Espionage Act of 1917 and the Alien Registration Act of 1940, this department must prevent the use of the mails to interfere with the war program. Writing forbidden by these acts is nonmailable, and the Postmaster General is given broad powers of enforcement. Newspapers which publish forbidden matter may find the mails closed to them, not only to particular offending issues, but also to their future issues as well, presumably on the ground that recurring violations constitute sufficient reasons for denying future privileges. Thus, during the First World War, the mails were closed to the Milwaukee *Leader* and the New York *Call*, and the second-class mail privilege was not restored to them until several years after the war.²⁸

C. The Influence of War upon Political Democracy

A consideration of the influence of war upon political democracy involves one of a number of topics introduced in this chapter upon which a

²⁷ See Byron Price's article, "How Can Censorship Help Win the War?" in Commager and others, *op. cit.*, Ch. 12.

²⁸ Z. Chaffee, Jr., *Free Speech in the United States* (1941 ed.), pp. 298 ff.

good book could be written. Here will be made only a few observations on the effect of war upon the popular interest in the conduct of government, the elective franchise, and the post-war influence of service men on the government.

Popular interest in government. As Europe was about to plunge again into Walpurgis night, the people of Britain were divided on the issue of war, between appeasers and those militantly ready to fight; but they agreed on one thing—that war would end their democratic government. As the war approached our shores, it was freely predicted that in fighting to save our democracy we would become totalitarian, and, after war came, a few Americans were so bold as to suggest that there might not be a Congressional election in 1942.

As a matter of fact democracy remains very much alive in both countries. Britons in popular assemblies and through the press are more than normally aggressive in expressing their views, which views are picked up by members of Parliament and brought to bear on the shaping of government policy. In November, 1942, we had our election, and a number of our congressmen were retired "with the consent of their constituents." That the war has transferred a great deal of power from Congress to the President is true, but a strengthened and responsible executive is not incompatible with democratic government. From the platform we hear and in the press we see many evidences of the continued absence of immunity from criticism of both President and Congress. No doubt the greater number of the suggestions, comments, and criticisms are irrelevant, partisan, or unsound, but it is equally true that others are well-considered, fairly presented, and not without effect in official quarters. It must be admitted, however, that popular interest in government in time of war is confined largely to the government's conduct of that war, and that on domestic problems the public's concern is likely to lag.²⁹

Democracy stands to gain by the sense of national solidarity which war creates, by the lifting of morale which comes to a nation with a great cause to defend. No one could possibly maintain that American morale in December, 1942, was not a great improvement over that of the preceding December, or that national unity had not been achieved during that period. It may be that such a development has only an intangible effect upon democracy, a general effect that comes from toning up our entire national life, but unmeasurable blessings are none the less real. War in-

²⁹ The fact that the vote in the 1942 congressional election was about 43 per cent lower than the vote in the preceding presidential election does not seem to indicate a healthy interest in the national government; but voting is only one method, if the most important one, of manifesting that interest. Furthermore, the low vote in the 1942 election may be explained by two factors: (1) the vote in off-year Congressional elections invariably runs several millions behind that of the preceding presidential election and (2) the very large dislocation of the population caused by the induction of five or six million men into the armed forces and perhaps the removal of that many more men and women into war production areas.

creates the spirit of self-sacrifice, spreads the willingness and the desire to share with others, creates a sense of civic responsibility. This is particularly noticeable in smaller communities and among the millions of unpaid volunteer civilian defense workers in all communities. Many of these people are serving their community for the first time. Some of them will catch the spirit for keeps and in post-war years may find a most laudable interest in working and planning with such city departments as police, fire, and utilities just as other citizens have found it in associating with the development of public education and recreational activities. This increased interest in civic affairs would be a victory for the home front.

The elective franchise. The First World War hastened the coming of woman suffrage in both the United States and Britain. The part played by women in that struggle greatly weakened "the woman's place is in the home" type of argument against equal suffrage, and in Britain the ballot was offered them shortly before the war was over and in the United States (a number of the states had already provided for it in their own constitutions and laws) shortly after the war. The same act which granted suffrage to English women swept away various restrictions which had prevented several million men from voting. In the United States the war had a restrictive effect of relatively minor importance upon the suffrage. In a number of the states it had long been the custom to admit to the suffrage aliens or aliens who had declared their intention of becoming citizens of the United States. Following the war, and partly because of the anti-alien and nativistic sentiments which spread over the country as a result of it, every state finally abandoned the practice.

In the fall of 1942 Congress had before it a bill which would have abolished the poll tax in the eight Southern states which still imposed it. The poll tax keeps impoverished Southern Negroes and whites from voting, but they operate much more effectively against the Negro race for which they were designed. When the anti-poll tax bill came before the Senate, a number of Southern senators staged a successful filibuster against it. The failure of Congress to enact this bill into law gives the Negro still another ground on which to lay the charge of race discrimination in time of war. A movement in a number of states to lower the voting age to correspond to the minimum draft age may make considerable progress, for it encounters no prejudice.

The influence of ex-service men in post-war politics and administration. For a long generation following the Civil War military heroes and just plain veterans, Confederate as well as Union, exerted a tremendous influence upon American government, national, state, and local. Elective offices they filled by the thousands and appointive offices (the low qualifications for which were lowered still further for veterans) they manned by the tens of thousands. The G.A.R. won liberal pensions from the fed-

eral government and the ex-Confederates secured less substantial ones from their own states.

Veterans of the First World War, by all accounts, have been very successful in securing adequate care for their disabled or sick comrades, pensions for certain groups, and a bonus for every man who wore the uniform of his country in that war. Furthermore, the national government and some of the state and local governments lowered the civil service requirements for veteran candidates for all appointive positions. Although a considerable number of these veterans were elected to public office, they did not equal in number or influence the record of their grandfathers in post-Civil War days, when both houses of Congress were practically swamped with ex-officers, Northern and Southern, and three generals, a colonel, and a major were elected President. In 1920 General Pershing's boom for the presidency did not get started, and the only officer of the First World War who has been a serious contender for the nomination was Leonard Wood, a politician-general whom Pershing would not permit to serve under him in France. It is probable that the veterans of 1917-1918 failed to match the political power of the boys in blue and gray because the First World War was not for America a great struggle in which the life of the nation was at stake and, in consequence, its veterans failed to capture the imagination, the hearts, and the votes of the electors.

What will be the place of the veterans of the Second World War in American politics? Of two things we are reasonably certain: there will be eight or ten million such veterans, certainly double the number of the last war, and the present struggle is a great national crisis comparable to the Civil War. Add these two facts together and the sum is ex-soldier influence comparable to if not greater than that of the veterans of the Civil War. Eight million veterans will have millions of wives, brothers, sisters, and other relatives with votes. Moreover, the country, rejoicing in its grand triumph, will be proud of and generous to its veterans. In the years to come we may expect to see another era of military men in civil office. Let us hope that they will be as good as our civilian-soldier statesmen Hayes, Garfield, Harrison, and McKinley and that none will be as bad in civil office as Grant, the trained soldier.

We may be sure that the new veterans will not let us off when we have given them elective and appointive office. Veterans of other days have asked for homesteads, pensions, and bonuses, and they have been granted. The latest veterans will, in all probability, ask for something more, and get it. Already large and generous plans are being made for the professional education and vocational training of returning veterans. This aid is only one of the most commendable types that they will receive. Veterans have the habit of interesting themselves in government policy, particularly in matters of national defense, international relations, immi-

gration, labor, and education. Aside from the matter of defense, they may know as little about these subjects as the rank and file of citizens; but at times it has seemed that their attitude has been: "We have worn the uniform of our country; therefore we know." We may hope that in passing upon questions of future government policy the soldiers and sailors who now fight to conclude the struggle to which 1917-1918 was the prelude will, upon their return to civil life, exercise a restraint equal to their gallantry in the present action.

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The Obligations of Citizenship

★ ★ ★

I. THE AMERICAN HERITAGE

"We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States . . . And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor." *Our Lives, our Fortunes and our sacred Honor!* These were no empty words. Having defied an empire and called forth a new nation, the Signers were in honor bound to go forward until their purpose was accomplished, and the penalties for failure were the penalties for treason—the confiscation of their estates and death by hanging.

The bequest of liberty. Washington's Army met with reverses, men and supplies came in slowly, and in the late fall of 1776 Thomas Paine, the great agitator and pamphleteer of the Revolution, wrote one of his classics. "These are the times that try men's souls," he began. "The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands it *now*, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph. What we obtain too cheap, we esteem too lightly; it is dearness only that gives every thing its value. Heaven knows how to put a proper price upon its goods; and it would be strange indeed if so celestial an article as FREEDOM should not be highly rated." These words warmed the hearts of the thinly-clad and ragged soldiers of the Continental Army. The patriots may have irreverently agreed that they could make good use of a moderate quantity of what is reputed to be the chief ingredient of hell; and as they left their bloody footprints in the snow and shivered in their bunks they must have commented, perhaps in language less celestial but no less picturesque and vigorous than that of Thomas Paine, that freedom was being contended for at great cost. Indeed, the statesmen who guided the in-

fant country and the soldiers who fought for her existence knew the price of a nation's freedom.

No less heroically, and, on occasion, no less dramatically, men and women have assumed great risks to win personal liberties for themselves, their children, and their fellow-men. In the chapter on Civil Rights attention was given to a provision of the First Amendment of the Federal Constitution and similar provisions in our state constitutions—the guaranties of freedom of religion, of speech, and of the press. Who fathered the principle of religious freedom? Roger Williams, whose leading tenet was that “no one should be bound to worship or to maintain a worship against his own consent.” For his heresy, he was banished from Massachusetts Bay Colony, and, after spending a winter of privation in the forests, founded a small colony at Providence in which he did not hesitate to apply his conception of religious liberty. Anne Hutchinson, “of ready wit and bold spirit,” “like Roger Williams or worse,” to use the language of the exasperated Governor Winthrop, was also voted the honor of banishment from Massachusetts, after which she contributed her part toward establishing religious freedom in Rhode Island. These two heroes of independent thought and deed; John Bunyan writing in the Bedford jail; ministers of other dissident groups who, jailed in Virginia for preaching contrary to law, continued their exhortations from their cells; and many others of equally stout convictions—men and women who paid the price of freedom of conscience—are the people to whom we owe our religious liberty.

Among many other jewels of freedom which we now take for granted is the right to the writ of habeas corpus. It was not always so. James I and Charles I, for reasons which seemed sufficient to themselves, but which were not in accordance with law, arbitrarily committed to the Tower troublesome members of the Puritan gentry. In 1627 the court held that the “special command of His Majesty,” without regard to the law of the land, was sufficient reason for retaining men in prison. Accordingly, some of the choice spirits of England languished behind bars for no other cause than that they had incurred a king's displeasure. But there came a day when the sufferings of these men bore the fruit of freedom. In 1679 Parliament passed the Habeas Corpus Act prohibiting imprisonment except for cause expressed in law. The privilege of the writ of habeas corpus thus established in Britain became the heritage of Englishmen in America.

Essentially the same story could be told of practically every liberty we now enjoy. Nearly every clause of freedom written into our constitutions has in it something of a biography of lonely mental pioneering, moral courage, and physical suffering. For centuries gone by, men and women of original mind and noble purpose have borne the ridicule of their neighbors, heard the contumelious taunts of their opponents, some-

times experienced the loss of their estates, on occasion groaned on the rack and rotted in dungeons, and in not a few instances died gloriously on the scaffold. We have our liberties because our progenitors knew what it was to be without them, because they thought they were worth the cost in terms of effort and sacrifice. They have passed on to us our democratic heritage—a fortune in civil and political liberty. Those who have inherited material fortunes have sometimes held them lightly, wasted them in riotous living, and in other ways demonstrated their unworthiness as heirs. Legatees who have some appreciation of the thought and toil back of their inheritance are more likely to conserve it and use it wisely. Whether this is true or false with respect to inheritors of property, it is appropriate to emphasize, as indispensable to all of us who hold obligations of citizenship, an appreciation of the value of the treasures of rights and liberties which our forefathers have bequeathed to us.

Nature's gift. It has been possible for a nation founded upon freedom and possessing a minimum of nature's bounty to carry the light of democracy in a world of relative peace and calm; but in this new age of tyranny such lights are being extinguished one by one and the few that are left emit only flickering gleams of freedom. Democratic traditions are not enough. A nation must have power. In this respect America is nature's favorite among the nations. It must be admitted, however, that nature had considerable human encouragement in the process of presenting to us our continental empire of nearly three million square miles, since we assisted her by purchase and by conquest. If some of the methods by which we acquired our domain rest upon the national conscience (and they ought to), they do not detract from the fact that the wealth in and under the soil of this domain is nature's gift.

Much of our soil is fertile and produces a variety of crops and fruits, the mere listing of which would exhaust any speaker and the quantity of which, while measurable, is far beyond our conception. There are forests on the land—still vast forests despite our prodigal use of them in the days of our national adolescence. From the glaciers in the mountains and the springs in the hills flow rivers that cause deserts to bloom, turn the wheels of industry, and bear commerce. Almost fabulous are the possibilities of our rivers in terms of hydro-electric power. Beneath the soil lie minerals, ores, and oils in quantities far in excess of those possessed—with one or two possible exceptions—by any other nation.

Yet it should not be said that man's land hunger and nature's gift alone make a nation economically strong. The fields must be tilled, forests must be felled, minerals must be mined, and the rivers must be harnessed. This is the work of man, and the men who have made America have not been remiss in these tasks, albeit they have accom-

plished them not without mistakes and great waste. No historian can deny that there have been many "pirates" and "robber barons" among those who have exploited our natural resources, but all record that the sum total of our economic enterprise has brought us national power thus far unrivaled by any other country.

We should appreciate the material strength which is ours as a result of our advantage in resources. If the nations now court our aid and fear our disfavor it is not because of the moderate strength of our Army and Navy. It is the mobilization of American industry which arouses the hopes and fears of other nations. It is economic power which gives us our "place in the sun." The fact that we are among the first nations in economic power (the meaning would be no different if the word "economic" were stricken out) furnishes no occasion for boasting, a feat in which we have, regrettably, often excelled. Rather does it impel us to ponder carefully the use we will make of this strength.

We, the citizens of this Republic, the heirs and custodians of cherished civil liberties wrested in most instances from unwilling, and in some cases, tyrannical, authority, of numerous political privileges acquired with somewhat less effort and sacrifice, and of vast resources which are the gift of nature, have responsibilities commensurate with our inheritance. In many other lands the people, impoverished and distraught after the First World War and its backwash, have frankly said in effect: "We cannot inform ourselves; we cannot arrive at intelligent judgments. Besides, freedom, civil or political, is a dream. Give us a strong man. We will let him find the facts and do our thinking, and in exchange for the burden of which he relieves us we will repeat his words, think his thoughts, bleed when he is pricked." Especially do they bleed when he is pricked—they die in his battles. In countries which have never known anything of freedom except a few of its forms the coming of a new leader can mean no great loss to the people. The new regime does not differ so much from the old except that the new despot has reduced tyranny to a science. Peoples who have known something of the "rights of man" and who picked the dictator as an easy way out of their perplexities have awakened, too late, to the fact that they have sold their rights for a "mess of pottage."

We in this land, who can enjoy the antics of *The Great Dictator* at the cinema, may profit by the mistake of those who have lost practically the last vestige of their liberties. Their mistake was that they sought to eradicate the evils of democracy by the destruction of democracy itself, somewhat as a farmer might burn his barn in order to destroy a few rodents. Obviously our problem is to preserve the democratic system by improving it, primarily by taking seriously the obligations that the system imposes. It is the purpose of this chapter to suggest some of them.

II. THE QUEST FOR INFORMATION

The search for facts is the citizen's first obligation because without them he will be able to perform few, if any, of his other obligations. Candor compels us to admit that this is a difficult assignment, one impossible to complete with scientific accuracy. We derive some encouragement, however, from the reflection that there are very few hundred "percenters" in any performance and that much less than perfect knowledge serves in most cases as a satisfactory basis for the judgment and action of the citizen.

General sources of information. Turning on the radio one learns that he has only one choice among pens if he wishes to write satisfactorily; that his wife can be sure of holding his love by using the only love-holding hand lotion; that he will select only one brand if he wishes to smoke the cigarette fit to smoke; that he will enjoy early rising if his wife serves the only breakfast food fit for human consumption. Momentarily he may wish for a dictator who would keep some of this annoying advertising off the air; but then he reflects that the dictator would probably prohibit the broadcasting of many good programs and reserve the air exclusively for his own purposes. In any event, with all of its irritating practices, the radio does furnish us with news and with many worth-while opinions. Through a little "shopping around" by means of the radio dial any person of ordinary intelligence can soon learn when and from what station or stations good news broadcasts come. By continued attention he can learn who gives the news and who mixes opinions with the news, and with the help of some of the better news programs he can form some intelligent opinions of his own.

The newspaper is, of course, a much older source of information than the radio. Despite well-founded criticisms of the modern daily paper, it is probably a better source of news today than it was fifty years ago. In those days journalism was largely personal, some of it brilliantly personal and sincerely devoted to the public good; but it was common to find, even in the best of these earlier papers, personal and partisan bias not only in the editorials but also in the news columns. The criticisms most frequently heard of the newspaper in our generation is that it is primarily a business enterprise, often a corporation, and as such it is concerned chiefly with profits for the owners. It is argued that, since advertising is the largest source of income for the newspaper publishers, the temptation to publish only such news as will please the advertisers is not always resisted. Certainly it can hardly be denied that, all too commonly, significant news is suppressed, published as inconspicuously as possible, or colored by misleading headlines. But there is no ground for despair. There are non-partisan newspapers which "doctor" the news hardly at all, and some of these are cleared of any charge of know-

ingly distorting the news. Furthermore, there are partisan journals which, according to workable standards in an imperfect world, acceptably present the news, however biased they may be in their editorial columns. Yet it is perhaps not unfair to say that the newspapers which come into the homes of the majority of citizens fail to give the news in unbiased fashion. If citizens "know their newspapers"—and an encouraging proportion of them do—it is possible for them to learn much from the news columns without being led astray. An individual should be on his guard against becoming a constant reader of one partisan newspaper and accepting its diluted news and fortified editorials as "law and gospel." No less indiscriminating and no more serviceable in democratic society, however, is the individual who, exasperated with the partisan appeals of the only newspaper to which he can conveniently subscribe, blindly sets his course against anything that particular publication might advocate.

If one is not particularly concerned about the news of the day and hour, it is quite possible to shun the radio and the newspaper (the late Justice Oliver Wendell Holmes, one of democracy's noblemen, did not read newspapers) and still be sufficiently informed for a fairly intelligent discharge of the obligations which democracy imposes. There are a number of so-called weekly news magazines which give, in popular language, very satisfactory summaries, often with interpretative comment, of the important events and developments. Available to persons of most modest income are well-established, seriously-purposed, monthly periodicals, presenting timely articles on current problems. Although these publications may be rather roughly classified as conservative, liberal, and radical, there is seldom an issue of any magazine devoted to public questions which does not present some new facts and stimulating suggestions.

It goes without saying that one must be constantly on guard against propaganda. Over the radio and in the press propaganda is often mixed with the news, and the naked news itself may be so presented that it is nothing more than propaganda. By comparing and checking different sources of information one may eliminate a certain amount of misinformation. It is possible to develop a critical listening or reading attitude which will enable one to discount much that is brought to his attention. Such statements as "it is alleged," "a high official of the government who desires not to be quoted is reported to have said," and "it is the opinion in informed circles that" should heavily discount the accuracy and value of any statement that follows.

It is freely admitted, however, that no suggestions which might be given can render the responsible citizen's task of seeking information a simple one. Yet we insist that it is a responsibility he must not shirk. The most tragic course he could take is to abandon the effort to inform

himself and retreat into a shell of cynicism. This is abdication, the abject surrender, of a public trust reposed in every citizen.

Special sources of information. The preceding paragraphs carry some suggestions for all citizens. Those that follow are addressed more especially to those who will soon be college graduates, both men and women, those who because of their opportunities must assume positions of leadership in civic affairs. They should be ready to participate actively in dealing with such proposals as the council-manager system of government for their city, a judicial council for their state, the merit system for government employees in any area of government, interstate trade barriers, the bases of trade between Latin America and the United States, intervention in a war, and so on. Of course no one is prepared on a moment's notice to take a leading part in the disposal of such questions, but a college graduate should be able, on occasion, to study a particular issue and make a contribution to its solution.

The problem is to assemble the information. How is that done? Let us look at the solution from the point of view of one whose college days are already behind him. It is not improbable that interest in specific public questions may have been aroused in college days. The responsible citizen faced now with an old question presented in unacademic form may find that his college books, even some of his old notes, may take on a new significance. The sources suggested might give him some leads and hints as to the location of more complete information. Again perhaps he may, when faced with a civic problem, believe it or not, write to his former professors for suggestions and references to other authorities. It is not recorded that any professors have objected to assisting in this way in the development of their former students; on the contrary, they are usually pleased and flattered that their aid is sought.

Much more helpful than the old professor is the library. Nearly all cities have fairly good public libraries, and few large cities are without an educational institution which has a library containing a wealth of information for the inquiring citizen. All too frequently he asks for books, and only for books, on a particular subject. To be sure, there is no objection to the use of books, but books seldom tell the whole story. For one thing, books are seldom up to date; and for another, there may be no books on a question for several years after it has become a subject of public discussion. There are many pertinent questions about which no book is ever written. On current problems, periodicals of various professional societies are commonly much more fruitful sources of information than books.

Does a citizen seek information on a point of international law or foreign policy? Let him examine the current issues of the *American Journal of International Law* and *Foreign Affairs*. Is his interest for the time being on some phase of city government? Let him refer to the files

of the *National Municipal Review* or *Public Management*. If he is concerned with a problem of administrative organization or procedure, let him refer to the *Public Administration Review*. Perhaps also it would not be amiss to mention one other professional publication, the *American Political Science Review*, which has a rather wide and general range in the whole field of government. These are but samples, and the publications listed as containing helpful information on the questions raised are taken almost at random with no intention of intimating that there are not others which might be equally helpful.

III. INTELLIGENT VOTING

In the lush 'twenties there was such a falling off in participation in elections that a number of organizations solemnly warned us of our duty to exercise the elective franchise. More strenuous times have awakened us politically to the point where general "get out the vote" movements hardly seem necessary (if they ever were). Much more important than the mere fact of voting is the exercise of an intelligent choice, and if an election stimulates so little interest that an individual has no basis for a judgment on candidates and issues, democracy suffers no more when he stays at home than when he votes. What is wanted and what we do not always get is discriminating voting. "Will you please tell me," asks a character of the cartoons, "how I can mark my ballot so that I'll be voting against the present administration?" This picture is a gross exaggeration of the situation, of course, but there is enough sad truth in it to curdle its humor. All too often the voters are "mad" and vote against a candidate they dislike rather than for a man of their choice. Mr. Norman Thomas tells the story of a man who, after having heard him speak (1932), said: "Mr. Thomas, I agree with all you say, but I must vote for Roosevelt because we must 'get' Hoover."

The man who wanted to "get" Hoover illustrates another shortcoming of voters, a weakness especially common to faint-hearted third-party adherents. This is their belief that their candidates will not win and their desire to cast a vote for candidates of a major party who have a chance of winning, even though they dislike those candidates or their principles only less than they abhor the standard bearers of the other major party. Such voters justify their action by saying that they do not want to "throw their votes away." The late Eugene V. Debs, believing, perhaps for good reason, that he suffered a loss of votes by the application of this theory, tersely commented: "The only man who throws his vote away is the man who votes for a candidate he does not want and gets him." Surely it can be said that a person who to "save" his vote marks his ballot for candidates not of his choice has thrown away his political principles.

This effort to make one's vote count is not a citizenship delinquency

manifested exclusively by those in the outer fringes of third parties. Voters who call themselves independent are sometimes moved by the desire to be on the winning side. When it seems that a particular candidate or party is in the lead, they get on the band wagon. A devoted wife, in one of those damning statements that only a proud spouse can make, once declared that her husband (who was always very diplomatic) was independent in politics; that he had only once voted for a presidential candidate who did not win. In 1916 he had voted for Hughes, probably because he had been misled by election forecasters!

The partisan who votes a straight ticket when another party may have superior candidates for some offices is simply a cog in a wheel of a party machine. There always have been those who refused to cross the party line even if it meant supporting a fire hydrant for mayor or a manhole for councilman. Around 1900 a candidate's name was often placed in nomination at a convention with the statement that he was a Republican or a Democrat who had never "scratched the ticket" in all his life. (This term arose because before the introduction of the Australian ballot one could vote for a candidate of another party only by drawing a line through the name of a nominee of his own party and writing in the name of his choice). In grandfather's time voters of only mild partisan faith were loathe to perform this drastic operation on the party's ticket. It may well be that the failure of the voters to engage in this type of grafting on their ballots had some relation to the forms of political graft which brought American politics into disrepute.

Fortunately, in recent years, the number of voters who "scratch," or "split," the ticket has been on the increase. For one thing, splitting the ticket is now only a minor operation, requiring simply that the voter mark a cross opposite the name of each candidate of his choice, regardless of the party affiliation of the candidates. There is no more "scratching" (although the term is still used); no more "writing-in," unless the voter desires to support an individual who has not been nominated by any party. Much more significant than the mechanical improvement of the ballot is the decline of blind partisanship on the part of the average voter. That this change has taken place is difficult to prove, but many observers are insistent that the trend is away from partisan allegiance and toward independent voting. In the opinion of the writer a few figures from two recent elections indicate a healthy degree of independence on the part of the electorate:

STATE OF IDAHO, GENERAL ELECTION, 1936

<i>Republican votes</i>	<i>Office</i>	<i>Democratic votes</i>
66,232	President	125,683
128,723	U.S. Senator	74,444
83,430	Governor	115,098

STATE OF WASHINGTON, GENERAL ELECTION, 1940

<i>Republican votes</i>	<i>Office</i>	<i>Democratic votes</i>
322,123	President	462,145
342,589	U.S. Senator	404,718
392,522	Governor	386,706

It is no less essential that voters participate intelligently in primary elections than in general elections. Forty years ago the political machine frequently controlled the party through manipulating conventions. Since the advent of the direct primary the machine attempts to capture this nominating system. All too often it succeeds in doing so, and it succeeds because in many areas the rank and file of voters do not participate in the primaries. Partisanship will bring a majority of party members out for a general election, but it does not cause them to see the importance of nominating the best possible candidates. Is not the selection of candidates of competence and integrity a mark of the most enlightened partisanship and citizenship?

Perhaps the principal reason for the voter's sluggish interest in the direct primary is that he has failed to grasp the fact that his part in choosing elective personnel consists of two fundamental steps—nomination and election, and nomination no less than election. It is no answer for the non-partisan voter to say that his independent political status debars him from participating in the primaries, for the election laws of most states are not so rigid as to exclude him from such participation and his conscience is unduly sensitive if it stands in his way.

IV. ACTIVE PARTICIPATION IN POLITICS AND PUBLIC AFFAIRS

Voting, even voting regularly and intelligently, is not enough. A citizen who has had the advantage of a high school or college education should take his place on the active list in the discussion of public questions, in political campaigns, and in urging upon government officials programs in the public interest. If we sleep through sewer scandals, oil steals, social security agitation, neutrality fights, and city, state, and national election campaigns, democracy will die as we slumber. It is fatal to say that politics is dirty, and no place for a lady or gentleman. This attitude will only make true what is now only half true. It will turn politics over to the self-seekers, the spoilsmen, and the underworld. The "cleaner than thou" heirs of American democracy must come forth and take their place on the firing line and, if need be, in the mud. They will probably be surprised at the number of powder-begrimed and mud-besplattered persons who remain clean within, and their experience will certainly be broadened and their disposition will probably be enlivened.

The late President A. T. Hadley of Yale once suggested that there were at least four different types of political activities in which American citizens might appropriately engage: one man might desire to enter politics as a career; another might prefer general part-time activity in good government movements, such as civil service reform; a third may reserve his activity for emergencies and crises; a fourth—and he has by far the largest company—may content himself with the exercise of general influence on the conduct of public affairs.¹ As there is usually no great difficulty in engaging the service of citizens in time of emergency we shall center our discussion on the other suggestions.

Mr. John Civis is what one would call a substantial citizen. He has no political "axes to grind" and no burning zeal for any particular political reform, but he has a laudable desire to make his weight felt on the side of honest and efficient government. How does he accomplish his aim? Of course, he keeps himself informed. He arrives at his conclusions independently and he does not hesitate to voice them, giving the ground upon which they are based. He will write to or call upon the City Engineer, the Director of Public Health, or the Mayor in connection with an important matter which, in his opinion, ought to be adjusted or pressed. He will write an original letter (not simply sign one handed to him by a pressure group), suggesting to his United States Senator or any other representative official a course of action in reference to any issue involving public policy on which he (Mr. Civis) has an opinion he desires to have considered. In these and numerous other ways he will make his influence felt among public officials, party leaders, newspaper editors, and those who like himself maintain an intelligent and somewhat general interest in government. The weight of the opinions of this one citizen will not be in any sense decisive, but if a small percentage of the disinterested voters, say 5 per cent, should do likewise, a major part of the reason for writing this chapter on the obligations of the citizen would no longer exist. The trouble is that we have left cranks and those seeking special favors as the almost exclusive users of the avenues through which those who conduct government may be reached.

Our same John Civis will find that he can improve his mind and broaden his usefulness as a citizen by participation in public discussions of current problems. Town halls and forums, an encouraging development of recent years, admirably serve the purpose of discussion. It is true that such discussion often "gets nowhere," but that is usually because the leaders have not taken the pains to prepare for their function. With the assumption that the participants are prepared, the forum is informative, interesting, and often lively. There is no better proof of the vitality of democracy in any community than the existence of well-managed forums where not too many holds are barred.

¹ Cited in R. C. Brooks, *Political Parties and Electoral Problem* (1933 ed.), p. 576.

If John Civis prefers to concentrate his efforts on specific points of civic improvement there is no dearth of good government movements and organizations with which he may affiliate. President Hadley mentioned civil service reform as an example of such a movement, and he doubtless did so because this is not only one of the oldest but also one of the most effective of the better government movements. For sixty years the National Civil Service Reform League has waged unselfishly with dignity, understanding, and confidence an unremitting fight against the spoils system in politics. Its achievements are noteworthy, but its work is not finished. Those who are attracted to its banner will be following in the footsteps of such eminent citizens as George William Curtis, Theodore Roosevelt, Woodrow Wilson, and Charles W. Eliot. There are also scores of other organizations, national in scope, which devote themselves to the public interest as they understand it. Among these may be mentioned the American Peace Society, the Navy League, the National League of Women Voters, and the National Consumers' League.

There are not a few national organizations which concern themselves with state and local problems—the National Municipal League, the National Short Ballot Association, and the National Institute of Public Administration among others. Nearly every community has a variety of organizations which are concerned with government problems. Some of these groups are interested primarily in matters which directly affect their members, others are quite disinterestedly devoted to the public good, but the greater number of them represent a combination of these two motivating factors. There is no city of any size in which an individual with normal concern about his own and civic affairs will not find a congenial organization or two in which he can enroll as a worker.²

To those who would find their place in government reform organizations this writer makes bold to offer a suggestion. Keep your sense of humor, your balance, your imagination. You will need them. Who has not seen the unimaginative, humorless, fanatic reformer, characterized by Theodore Roosevelt as belonging to the "lunatic fringe," who drives more people away from the camp than a well-balanced recruiter can draw to it? The good reformer must be a politician in the sense that he must know when to press his point, how hard to press it, and when to give the public a "breathing spell."

There are those who have the entirely laudable ambition of entering politics as a career. How shall they proceed? There is no fixed rule of action; no set plan. The writer knows of one young man who, residing in a tough urban district in Prohibition days, sought entrance to public life via bar tending. It is hoped, however, that others will make their start within the framework of the law. It is relatively easy to make a

² See Brooks, *op. cit.*, pp. 579 ff. for an interesting discussion on active participation in politics; also W. E. Mosher and others, *Responsible Citizenship* (1941) pp. 842 ff.

beginning. Those who have not found it so have started out by demonstrating that they were not very promising politicians. That is, they have tried to start too fast, too high, or condescendingly. A young person must in practically every case begin at the bottom, in his precinct. First, he should ascertain whether or not the local organization of his party is such as to command his loyalty. If it does, he can then approach his precinct committeeman with every prospect of a welcome. The committeeman will give him work, without pay, distributing "literature," interviewing voters, talking to young people who are not yet old enough to vote, and helping in various other ways to build up the party in the precinct. The young recruit will not, in all probability, be asked to make any speeches, write any articles, or participate in matters of major strategy; but if he carries out his humble tasks with modest, cheerful efficiency, the day will probably come when he will be a leading political figure not only in his precinct but also in larger areas.

In an earlier chapter the importance of the precinct as a political unit was emphasized. All political workers and organizers recognize this fact. They do not scorn the lowly unit cell of party life, nor those who tend the cell. Votes come from precincts and from nowhere else. It might be said with a great deal of truth that a party is no stronger than its precinct workers. There have been successful party workers who have gone on to membership on state and even national committees of their party who took pains to retain the post of committeemen in their precincts. Such men recognize the importance of holding their local bailiwicks to the fulfillment of their ambition to ascend the scale of the party hierarchy. They feel that they are weakened in their claims for larger things if they are not "solid" in their own precincts.

Although it is a fact that party workers usually start in the precinct, there are possibilities of beginning at a higher point. A young woman who has made a study of social legislation might find that she is in demand as a speaker on a particular social issue throughout a city or even a state. An active young member of the Chamber of Commerce may become interested in problems of taxation and take his place as one of the leaders in a community effort to introduce a better tax system and set out to do something about it. Such opportunities are numerous and varied and present special, although not exclusive, opportunities to college graduates. From the springboard of interest in some significant issue an individual who may not have had any idea of entering politics may find himself "up to the neck" in politics, the very best kind of politics. And it might take most of his time and start him on a career in public office.

There are words of caution for those who would enter politics as a career. Politics is one of the most unstable of all callings or professions. The worthy candidate may not be elected, or, having been elected, may

soon be rejected. It seems desirable therefore that an individual with political ambitions should have independent means, or a business connection, or a profession, or a job to which he could retire in times of political reverses. The early political successes of Theodore and Franklin D. Roosevelt are often attributed to the fact that they had no financial worries and could give themselves unreservedly, without concern about educating their children or about old age, to the fascinating game of politics.

It is sometimes said that public men without independent sources of income are less to be trusted as public servants than are those in the more favored economic group; that poor men are likely to sacrifice their principles in order to continue in office. It is not within the knowledge of this writer that this proposition has any basis in fact. Rich men and poor men have abandoned their principles, have betrayed the public to serve themselves or their party or faction. Certainly men of small means and large ideas ornament many pages of American history. Although it must be conceded that poor men who enter politics are under a decided personal handicap, the suggestion that they are less likely than others to prove themselves worthy agents of the people is inadmissible.

Politics is of course a gamble. The best laid plans of the most meritorious aspirant may fail to materialize. Party leaders may set him aside for reasons of geography; or he may be passed over as a result of a change in the factional control within his party; or, if nominated, he may fail of election because he is on a ticket with others who do not inspire confidence; or he may go down to defeat because his nomination comes at a time when the popular trend is against his party. For these and many reasons beyond his control and for which he is in no way responsible he may fail to achieve his goal. His chance may come again; it may not. In any event, he should be able to smile, to "take it."

Those who find the political field inviting may not resent a statement concerning decency in politics. Scandals and skulduggery make newspaper headlines; integrity and respectability do not. The exploits of blemished political characters have often entertained the populace, while men of probity have failed to arouse any particular enthusiasm. As was intimated on another page, the public life is probably not as devoid of respectability as is commonly imagined, and the newcomer may be surprised at the number of serious, hardworking, passably upright men with whom he is associated. The standard of the average politician is probably every whit as high as that of the familiar campus "framer" and "fixer." Indeed, a campus politician of this variety who plans later to make politics a career might be warned not to attempt to carry with him all of his campus practices, at least not without first consulting the penal code. If we elevate our vision above the ward boss and the rural court house gang, we find, on the whole, a fairly honorable company. Ballot

box thieves, racketeers, grafters, bribetakers, and similar criminals are far outnumbered by men who, possessing perhaps a little less than their share of human selfishness, prejudice, and folly, take seriously their obligations as representatives of the people. Surely this is an attainable standard, an indispensable standard.

V. INSISTENCE UPON EFFICIENT ADMINISTRATION

It is a fact familiar to all who have even an elementary knowledge of government that its service is performed primarily by its administrative units. The legislative bodies assemble to determine policy, the courts sit to hear and decide cases and controversies, and the administrative forces, national, state, and local, a great army of several millions, carry on the daily routine of government, bringing it to the door of each individual. Administration not only does the work of government, but it also represents most of the cost of government. Therefore for two most excellent reasons citizens are vitally concerned with efficient administration. Fortunately they are not without a guide as to what constitutes good administration, for authorities are in substantial agreement upon its main points. Some of these should have brief mention.

First, of the administrative officers only the chief executive should be elective. This shortens the ballot, enables the voter to concentrate his attention upon important offices, and insures his interest in the election process. Furthermore, the term of the elective chief should be long enough (four years is considered about right) to enable him to perform some years of service after he has become accustomed to his job. Restrictions against eligibility for re-election are frowned upon.

Second, all other administrative officers should be responsible to the elected chief executive. The department heads should be appointed by him and be subject to removal by him. This helps insure an integrated and responsible administrative organization without which good administration is highly improbable.

Third, all administrative officials and employees, other than department heads, should be appointed and promoted on the merit principle, be under "civil service," to use the layman's term. Furthermore, they should be protected against removal except for failure to perform their duties. There is no place in decent administration for the spoils system. This cannot be said too often or too forcefully.

Fourth, all government contracts calling for any considerable amount of money should be awarded only after competitive bidding. Statutes and ordinances do not of themselves insure that contracts will be awarded fairly. Citizens need to be particularly watchful, even suspicious, concerning the letting of public contracts.

Fifth, the budget should be prepared under the direction of the chief

executive and submitted to the legislative body by him. Having been approved by the legislature, it should be subject to executive control in such particulars as the transfer of funds from one department or service to another, the monthly or quarterly allotments to the several departments, and savings within the appropriation made by the legislature.

Sixth, government supplies should be purchased through a central agency under competitive conditions. It may be that exceptions should be made in the case of certain materials needed by special types of institutions, such as colleges and universities, but there is not any doubt that centralized purchasing results in considerable savings for the regular departments of government. Moreover, there is always the danger that individual departments will purchase from friends or favorites inferior goods at high prices.

The intelligent citizen and student will think of other tests of efficient administration and apply them to the governments under whose jurisdiction he lives. He will remember that it is not any less his duty to insist upon good administration than it is to demand intelligence and honesty in legislative bodies. He will not be misled by the cries of "autocrat," "dictator," "bureaucracy," "tax-eating civil service employees," and similar catch phrases which are always used to prevent the adoption or obstruct the operation of an improvement in administrative organization or personnel.

A career in public administration is an obligation of some of the country's best brains and characters, and it is not without its attractions. One who has political ambitions must be willing to make a gamble, as has been stated, but an individual can lay his plans for a career in the administrative service with only a little less assurance than he would set out to prepare himself for the profession of medicine or engineering. It is true that no large incomes are ever received by the public servant, but the financial compensation even for the lowliest positions is sufficient for the maintenance of a respectable standard of living, and college and university graduates may hope to be paid salaries sufficiently large to enable them to live modestly as professional men. Perhaps the professional type of administrator receives his chief compensation in the satisfaction which comes to him from participation in large affairs and from responsible work well performed. With increasing opportunities in the civil service coming as a result of extensions of the merit system and the rapid increase of the tasks of administration, college men (a few women also) now find that professional opportunities in the public service roughly parallel those in private endeavor.

VI. ACCEPTANCE OF THE BASES OF REPRESENTATIVE
GOVERNMENT

As our democracy functions through representatives it is essential that we accept the bases upon which representative government rests. No doubt good authorities would vigorously debate the validity of certain principles on any complete list that other authorities might present; but this writer, without making any pretense of presenting an exhaustive list, suggests just three principles which he believes most authorities would accept. They are (1) a habit on the part of the voters of respecting the judgment of their representatives; (2) tolerance on the part of the party or faction which happens to have the responsibility for conducting the government; and (3) compliance (not necessarily cheerful or uncritical) on the part of minority groups.

Burke on the representative's relation to his constituents. In a day when we sometimes seem inclined to place our casual judgment, or simply a desire based upon community or personal interest, against the more considered judgment of our representative and demand that he serve us simply as an errand boy, the words of Edmund Burke, one of the most gifted of all the men who ever sat in the English House of Commons and a warm friend of America, are singularly appropriate. Addressing the electors of Bristol, November 3, 1774, he said: "It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion high respect; their business unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfaction, to theirs; and above all, ever, and in all cases, to prefer their interests to his own. But his unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. . . . Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion."³

Six years later, he addressed the same electors, as follows: "I did not obey your instructions: No. I conformed to the instructions of truth and nature, and maintained your interest, against your own opinions, with a constancy that became me. A representative worthy of you ought to be a person of stability. I am to look, indeed, to your opinions; but to such opinions as you and I *must* have five years hence. I was not to look to the flash of the day. I knew that you chose me, in my place, along with others, to be a pillar of the state, and not a weathercock on

³ Edmund Burke, *Works*, I, 446-447.

the top of the edifice, exalted for my levity and versatility, and of no use but to indicate the shifting of every fashionable gale.”⁴

Voiced over a hundred and fifty years ago, these words are no less applicable to our own day. Indeed, considering the demand upon modern government, the numerous details and complexities of its functioning, Burke's theory may be more imperative in our time than it was in his own. Our elected representatives are above the average in intelligence. They are at the center of government, giving the major part of their time to shaping its policies. We have the right to advise them and to retire them to private life if they do not accept our counsel. But should we not, upon reflection, praise, rather than condemn, those representatives who do their own studying, consult their own conscience, and arrive at their own independent judgment? Their ability is worth little to us if we will not suffer them to exercise their own judgment. It should be a matter of pride to us that we have had a few public officers who adhered to the Burke principle. One associates with Burke such Senators as William E. Borah, Carter Glass, and George W. Norris. Our confidence in representative government is greatly strengthened as we record the fact that a man of independent character, even when in disagreement with his constituents, has often won triumphant re-election, sometimes because the representative brought the voters to his way of thinking and at other times simply because the voters wanted to retain an independent spirit in office.

The tolerant majority. We have said that the party which is responsible for the conduct of government must be tolerant. Majority rule does not mean majority tyranny. The majority must be willing to argue peaceably with the minority, to hear its objections, to submit to its criticism, to heed its warnings, and to welcome its suggestions. A majority which outrages a minority by imposing upon it discriminatory or unjust legislation is striking a blow at the foundations of representative government.⁵ It might seem that this warning should be addressed to government authorities rather than to citizens, but a moment's reflection will show the justification for its wider application. The general tone and temper and direction of a government is shaped in the long run by the whole citizenry, and if the people are impatient and would deal unjustly with minorities, hateful government measures are likely to be enacted. Anti-parochial school laws and anti-German language laws are examples of legislation likely to be enacted when a democracy forgets its obligations to minorities.

Americans have most need for tolerance. Less than half of us are of

⁴ *Ibid.*, II, 138.

⁵ H. J. Laski, *Parliamentary Government in England* (1938), pp. 4 ff. contains an interesting analysis of the prerequisites of representative government.

British origin. Some sixteen million are Germans, twelve million are Negroes, ten million are Irish, and five million each are Scandinavian, Slavs, Poles, and Jews. Nearly all of these people are good Americans, and one who disbelieves this statement might give it more credence upon hearing alien parents sadly lament the complete and voluntary Americanization of their children. However, the offspring are not as American as their parents believe them to be, and this, on the whole, is no loss to the Republic. Indeed, the language, the literature, the ideas, and the ideals of peoples of different nationalities are well worth preserving as a part of American culture. It is superfluous to inquire what each of the races and nationalities mentioned have contributed to our national life. It is no less a work of supererogation to say that intolerance, whether manifested in discriminatory legislation or in laws which would impose upon peoples of divergent cultures a strait-jacket Americanism, would lessen their opportunity and desire to contribute their portion of that variety which enriches our civilization. Furthermore, just as we have need for moderation in dealing with races and nationalities, so also we need it no less in solving the problems peculiar to the social and economic areas into which our continental empire is naturally divided.

Americans can afford to be tolerant. Abundantly endowed with natural resources, fortunate in our national frontiers, and some distance removed from potential enemies, we are more secure than the people of any other nation. Our relative security has made it possible for us to carry on our debates and to fashion our domestic legislation, with some exceptions, along moderate lines. Times of emergency include some of the exceptions, and with the passing of the emergency we have returned, if somewhat haltingly, to rational arguments and even-handed laws. During recent years our foreign relations have been on a rather continuous emergency basis, and there are many evidences of restrictive and perhaps arbitrary (undemocratic) measures in the offing. The hope for democracy is, of course, that the passing of a crisis will mark the repeal of the measures designed to meet it.

Minority co-operation. If representative government presupposes consideration for minorities, by the same token it presupposes minority compliance with the government's established policies. On the whole American minorities, save a few small ones, have not been resistant to this requirement. During most of its history our country has had two major political parties holding remarkably similar principles on matters of major concern. The "never-ending din of political conflict," to use Lord Balfour's expression, may have caused us to believe that there were great issues at stake, but we confused the bare-fisted fight over office with what was in reality only a pillow fight over principles. This last sentence is somewhat of an exaggeration, yet not a gross exaggeration. Our Republicans and Democrats are in fundamental agreement on private

property, the profit motive, public schools, the conservation of national resources, and a host of other subjects. One party may believe in a little less regulation of business, a little less social security, slightly higher taxes on lower incomes, bigger or more battleships than another, but the fact remains that the major parties usually differ in degree and in method, rather than on principles.

Did the Republican party advocate, either in 1936 or 1940, the "repeal" of the New Deal? If entrusted with power, it would, in all probability, modify certain New Deal legislation and perhaps repeal some of it, but, in the opinion of this writer, its major features would be left essentially undisturbed. And thus our great political parties march along, arm-in-arm as it were, and the vast majority of us accommodate ourselves, often hesitantly but seldom with serious misgivings, to the program of whichever party happens to be in power.

It may be true that the day will come when two major parties take to the field to battle to the death not only for offices but for fundamental principles upon which they hold uncompromising and diametrically opposite views. This situation has arisen in Great Britain, where the Conservative and Labor parties differ on the basic question of the ownership of the means of production. When in power, however, the Labor party did not enact a socialist program, so that it can not be said that there has yet been made a test of the strength of representative government to withstand the shock of change from one economic system to another. There are those who doubt that it could meet such a challenge, maintaining that the conservative classes would not accept the change to socialism.⁶ Perhaps they would not. But if British and American history are guides to the future (and it must be admitted that history is not a perfect guide) a change by legislative enactment in either country, in a particular month or year, from one economic system to another is hardly to be expected. Changes we have had in our own country, sometimes so rapidly, as during the past ten years, that they have been accompanied by bitter denunciations and recriminations. Yet they have proceeded within the framework of fairly familiar economic and political patterns, and we have some reason to assume that future changes will follow a similar course. But however the changes may come, as long as they fall within the clauses of the Constitution, we must accept them. Resistance is revolution and revolution is not representative government.

No one should draw the inference from the foregoing paragraphs that it is the intention of the author to suggest that an individual should not offer legal resistance to any act of any government which, in his opinion, violates one of his rights. On the contrary, it is asserted that it is the duty of the individual to offer such resistance, for by so doing he not only protects himself from the operation of discriminatory measures but

⁶ Laski, *op. cit.*, pp. 148 ff.

he also performs a public service. Thus the man who goes to court to contest the validity of a special assessment, a subsidy, or compulsory insurance law represents his neighbors, even the whole nation, as well as himself. One of the healthy restraints upon a government which would be inconsiderate or arbitrary is the sure knowledge that individuals will resist, with every constitutional and legal means at their command, the application of unfair and unjust legislation. What is meant, then, when we say that the acts of government must be accepted is that, after legal means of contesting the validity of a law or policy have been exhausted, it is the obligation of citizens to comply, regardless of what that law or policy might be.

VII. RELIANCE UPON ESTABLISHED AUTHORITY

How did the Italians and the Germans lose their liberties to dictators? There are many explanations, to be sure, but a significant one is that vicious private bands, organized practically as armies, set about to rectify conditions. It is not to be denied that there were sore spots in these two unhappy countries, but their existence and the desirability for their eradication does not alter the fact that the exchange of the boils of democracy for the leprosy of totalitarianism was effected by armed forces operating outside the sphere of governmental authority. If this is a grim warning to every democracy to put its house in order, it is no less a warning of how not to achieve that desirable end. Totalitarianism is but the ultimate fate of a democracy which trusts too little in duly constituted authority, a fate which we hope is a long way from overtaking us in the United States. Yet, even if we make the comforting assumption, possibly a fool's assumption, that we are in no danger of the final disaster, we cannot flatter ourselves that we are free from the baneful effect of forces operating without the sanction of law.

The vigilante menace. In frontier days we had our vigilantes who, maintaining a crude form of "law and order" where there was no legal authority, perhaps justified their existence. The South, suffering under a vindictive and capricious Reconstruction, resorted to the familiar Ku Klux Klan (a special type of vigilante organization), and historians have not judged her too harshly. Both the vigilantes and the Klan have captured the popular imagination to such an extent that whenever there occurs a local disorder excited citizens are quick to suggest the old vigilante remedy, and whenever certain anxious souls decide that the aliens are a menace, that spies are out everywhere, or that their fellow-citizens have strayed too far from the path of rectitude and that the nation is in peril, the Klan or some variation of it is suggested as the instrument by which we might be saved.

following might be said: *First*, the duly constituted authorities are usually quite competent to handle the situation. *Second*, if they are not able to hold the disruptive forces in check, they can easily call to other duly constituted authorities for help, or they can swear in special officers from the local population. *Third*, there is the ever-present possibility that vigilantes may be made the dupes of clever men who have very personal (economic) reasons for advocating a vicious course of action. *Fourth*, vigilantes are largely irresponsible, and are ignorant and careless of the rights of persons against whom they act. *Fifth*, vigilantes are more likely to represent the physical strength and emotional instability of a community than its enlightened conscience and balanced judgment.

It seems axiomatic that good citizens should bear testimony against vigilantism of any kind. Yet its manifestation in labor troubles and in reference to "radical" speakers are so frequent as to cause grave concern to thoughtful persons. Particularly is this true in times of emergency and in the no less hectic periods of emergency's aftermath. Groups of the vigilante type have stoned pickers from strawberry patches, "roughed" an individual who stated that a particular act of Congress was unconstitutional, threatened, rotten-egged, and kidnaped champions of unpopular causes, and intimidated ministers who preached in a foreign language. In some cases such things have been done with the connivance of city or county authorities, a fact which indicates the extent to which the vigilante spirit has taken possession of us. College men and women have the opportunity and the obligation in their respective communities to take the lead against these misdirected efforts. One may be greatly encouraged at discovering the calming effects of a few words of quiet caution diplomatically spoken.

Lynching. Occasionally a group of vigilantes disgraces America with a lynching. This crime is not confined to offenses against the Negro in the South, but it does have its most frequent visitations on that race and in that region. Not only do a number of states have laws listing it specifically as a crime—in any case it is murder—but also, because of failure in the enforcement of these laws, there has been repeated agitation for a national law. Federal legislation on the subject, however, has been found to be politically impossible because of Southern opposition. Furthermore, an effective federal statute would be exceedingly difficult to draft because of constitutional limitations on the powers of Congress. Moreover, this crime is a social disease and there is doubt as to the possibility of a statutory cure.

The sad fact is that lynching has been enthusiastically, sometimes gaily, approved by millions of ignorant people and condoned by thousands of intelligent ones. It is significant that Governor Ritchie, who seemed to have a life interest in the governorship of Maryland, was defeated in the campaign for a fifth term, just after he had acted courageously and vigorously in an unsuccessful attempt to bring to justice the

leaders of a lynching mob. Governor Rolph's public approval of lynching in California brought a storm of protest from a number of editors and public men, but there is grave doubt as to whether his offer to pardon the lynchers, if convicted, caused him to lose standing with the "man in the street." Indeed, there were many men who were not in the street who agreed with Rolph, although they thought he erred in making a public statement.

An encouraging sign of progress toward the eradication of the crime of lynching comes from a group of progressive women in the South who denounce the men of that region who say that lynching must be condoned because it is one method of protecting womanhood. There are, in fact, few cases of lynching for rape, but a much higher number for trivial offenses to "keep the Negro in his place." An organization of great promise is the Commission on Interracial Co-operation, whose headquarters are at Atlanta. This Commission has directed thorough studies of lynching. The educational value of these studies and the other activities of the Commission may eventually sift down to some of the vicious and thoughtless persons of the variety who invariably participate in lynchings.⁷

The hood-shirt threats. Vigilante groups are commonly local and sporadic; the various "hooded" or "shirted" organizations cover wider areas and are set up on a more or less permanent basis with national officers, sometimes quite a little money, and always an ambitious program. Democracy, to be consistent, may not object to the presentation and advocacy of a program; but it probably has the right to compel its sponsors to go unmasked and ununiformed, and it assuredly has the duty to prevent them from resorting to violence. It is common knowledge that the type of organization under discussion usually advocates such principles as the abolition of free speech and religious liberty and some of the proponents seek the complete overthrow of democratic government. They would attain their ends by violence, and violence is a feature of their propaganda.

As was just said, it is the duty of government to curb the violence of such organizations, but government action does not go to the root of the trouble. No doubt un-American (they usually call themselves "American") crusaders draw their recruits from among a few thousands of disloyal citizens, but the vast majority of the volunteers are at heart good Americans who in their ignorance think they can save the country or in their boredom crave a little excitement. They work a short day; they shoot a little pool; they go to the movies; they almost never do any kind

⁷ *State Government*, March, 1934, pp. 58-61; L. T. Nordyke, "Ladies and the Lynchers," *Survey Graphic*, November, 1939. (Condensed in *Readers' Digest*, November, 1939, pp. 110-113).

of serious reading. Something more is needed, and the Patriots-plus with their regalia or uniform, their whisperings in the dark, their stimulating rumors, and their furtive missions may be that something. Give men something worth while to do with their leisure—give them live, wide-awake forums to stimulate a healthy interest in affairs, and to satisfy the sense of belonging, and give them vital literature popularly written—and there will be a considerable shrinkage in the recruiting ground for organizations representing a perverted Americanism. As noted in a preceding section of this chapter, participation in community activity of the type here suggested affords the college graduate an opportunity for self-development, and it may be added now that it also gives him the privilege of co-operating in the development of others.

VIII. ASSISTANCE IN THE ADMINISTRATION OF JUSTICE

The foregoing paragraphs are not intended to convey the impression that the private citizen should have no part in the administration of justice. On the contrary, it is clear that its effective administration calls very definitely for citizen co-operation. Everyone is familiar with our jury system, with the fact that juries are drawn from the list of private citizens. Familiar also is the charge that the average jury is not impressive in its intelligence, not distinguished for its devotion to fairness and justice. If the jury merits this reputation it is partly because so many persons commonly reputed to be intelligent, respectable, and busy use every means in their power to avoid jury duty. Thus it sometimes happens that a jury represents a great deal less than a fair sample of the intelligence and character of a community. It is not probable that a college student or anyone else who may happen to read these words will seek an early opportunity for a jury assignment because it is here stated to be his civic duty; but if he would accept the testimony of intelligent and dutiful citizens concerning their interesting and enlightening experiences on juries, he might be led to anticipate such an opportunity as a means of broadening his own experience.

The selection of judges and magistrates is a most appropriate subject for the citizen's interest. Obviously the quality of justice will not rise above those who preside over its courts. The layman may feel baffled at this point, and say that only lawyers are proper "judges" of judges. It is true that on certain technical matters of law and procedure only the members of the bar are qualified to pass upon the competence of a judge; but intelligent laymen are quite competent to arrive at an over-all and fairly accurate estimate of a judge and they should not abdicate this trust to the legal profession. The work of the police courts and most other local courts (the courts which handle the great majority of the

cases) is well within the understanding of the informed layman. More attention to those who preside over the courts would go far to improve the administration of justice as it touches the poor and petty offender.

There is, of course, the obligation, one in which we have not distinguished ourselves, to report crimes. Our reluctance to perform this duty may be found in our reaction against busybodies who from time to time have been greatly exercised over the enforcement of petty statutes and ordinances prohibiting conduct which many decent citizens did not consider criminal in itself. No one who takes a tolerant view of human nature would sternly advise his fellow-citizens that it is their duty to report every violation of every law. But it is certainly not unreasonable to expect third parties to report all felonies of which they may have cognizance and all misdemeanors which seriously threaten the health and safety of the public. In the class of misdemeanors which one might report without reproach are drunken and grossly negligent driving of a motor vehicle.

IX. THE PRESERVATION OF COMMON PROPERTY

To whom do public buildings belong? The nation, the state, the city, or some other government, we say. But a more direct and personal answer can be given—each citizen is an owner. Our parks, thousands of them, some consisting of green grass and a few trees occupying a few acres, others containing lofty mountains and roaring rivers and covering hundreds of square miles, belong to the public. In common ownership also are the fish in the lakes, rivers, and streams and the game in the hills and on the plains. Formerly we acted as if what belonged to everybody was the care of nobody, but in recent years we have developed a sense of responsibility. This has been accomplished in respect to parks by a dual program on the part of our governments, a program which, on the one hand, called for major development and use of parks, and, on the other hand, for public education in the proper use and care of such properties. A hundred years ago settler-hunters killed game for food, for themselves and their dogs, and they all too commonly slaughtered more than they needed, leaving it in the woods for buzzards and coyotes. Almost too late we realized that our wild life was being exterminated and enacted elaborate laws for its protection. It would be absurd to say that there are not many minor infractions of these laws, but it is encouraging to record that major violations are few in number. Yet adequate conservation of wild life will not be assured by law any more than speed laws will prevent reckless driving. What is needed, and we now have a measure of it, is a public which understands the reasons for protecting wild life and which is unselfish enough to co-operate to that end.

It is no great journey from the obligation to make un wasteful use of

common property to the obligation to use one's own property so as not to damage or impair the property of others. After all, there is no such thing as absolute ownership. Despite the objections of an owner the state can take privately owned land (if it pays a fair price) for a road, a bridge, a school house, a park, or a wide variety of other public purposes. Furthermore, the law has never recognized the right of an individual to do anything he pleases on or with his property. The nature of ownership is itself fixed by law, and who has not heard of the law of wills and inheritance. The law forbids an owner (or renter) to maintain a nuisance on his premises, to make such disposition of his property as to disturb his neighbor in the use and enjoyment of his. All of us are familiar with city zoning ordinances which specify what kind of business may be conducted in certain areas and prohibit business altogether in other areas; which prescribe the type of building that may be erected in various parts of the city, and so on. "Can I not do what I please with my own?" a large property owner once indignantly inquired. The answer was that he could not; nor can we, except in accordance with the law.

But the law can only prohibit or require certain types of conduct. It can prevent us from being the worst possible people with whom to be associated as contiguous property owners, but it cannot make us good neighbors. A citizen may in the use of his property observe all requirements of the law with meticulous care and yet be a very mean man. Happy community life depends upon the thoughtful and considerate use of one's property in dozens of ways which the law cannot and should not attempt to require. The law gives us only justice; neighborliness gives us friends.

X. FACING THE PROBLEM OF ECONOMIC SECURITY

"Democracy, to me," writes Maury Maverick, "is liberty *plus* economic security." The right to talk, think, and pray as one pleases are meaningless abstractions if food is not forthcoming with regularity. "You cannot fill the baby's bottle with liberty," says Maverick.⁸ It is an incontestable fact that freedom is a condition that may be enjoyed only by those whose life rises above a grim and unequal struggle for food and shelter.

True it is that most men suffer temporary hardships with fortitude and, if they have reasonable hope that the necessities of life will not be cut off, endure with infinite patience a submarginal existence. But they react with rebellious bitterness or debilitating hopelessness when there is no prospect of employment, no hope of improving their economic

⁸ *In Blood and Ink* (1939). Quoted in *Teaching the Civil Liberties*, p. 15, by Howard B. Wilson and others, National Council for the Social Studies, bulletin 16, (May, 1941).

condition, no security from want. Economic insecurity is thus a double danger to democracy in that it renders freedom practically meaningless to those in distress and brings near to all the threat of revolution. It may be argued with considerable force that personal economic insecurity was one of the chief causes for the failure of democracy in certain European countries and that its persistence in some little countries on that continent was possible because of the relatively high degree of economic security enjoyed by the inhabitants.

In the past decade (and in decades preceding it too) millions of American citizens have been unemployed and in want. Some would solve the problem by saying that there is plenty of work for all and that the unemployed should get jobs and go to work. Although it is true that a few very capable and resourceful people can always find some kind of employment, it is not possible for the average man to go from one employment to another, certainly not in a period of declining industrial activity. Governments, particularly the national government, have made efforts through doles, government work projects, and unemployment insurance to provide relief for those in distress, but it cannot be said that the problem of unemployment has yet been solved. It requires more faith than is good for us or our democracy to believe that, without heroic measures, the period which is to follow the Second World War will not be one of acute distress caused by industrial dislocation and unemployment.

Economic insecurity arises not only from unemployment but also from the hazards of employment, illness, and old age. Much has been done in recent years to banish these spectres from the lives of working men, but much remains to be done, and some of this remedial legislation has perhaps been prompted as much by political pressures as it has by the needs of those for whom it was designed. In slaying the dragon of insecurity our legislators need the support of all good citizens no less to enable them to resist unfair demands than to strengthen them in their efforts to provide a minimum of security for all. It must be admitted that this whole subject is full of unsolved problems, but no reasonable person can doubt that economic insecurity is one of democracy's most insistent challengers, a challenger which must be met and worsted.

XI. ADHERENCE TO THE PRINCIPLE OF ACCOMMODATION

In his justly famed speech on conciliation with America, Edmund Burke made the declaration that "All government, indeed, every human benefit and enjoyment, every virtue, and every prudent act is founded on compromise and barter. We balance inconveniences; we give and take; we permit some rights that we may enjoy others; and we choose

rather to be happy citizens than subtle disputants.”⁹ Great Britain, acting rather imperiously toward her American colonies at the time, learned a bitter lesson from that experience and later, in a spirit of compromise and accommodation, met with success in dealing with some of her other colonies.

Perfectionist souls there are who can see no compromise on any question, and the rank and file of honorable men will not compromise on certain issues; but the typical issue which presents itself to the public for solution can and must be met by compromise. Some want a very limited social security program, others want full coverage of all groups; some advocate a high tariff, others none at all; some wish only a mild regulation of public utilities, others would control them in meticulous detail. The reader may continue this listing of opposing forces, and he knows that the answer in each case, as expressed in terms of government policy, is compromise. Few, if any, know the perfect answer, and the extremists, who are most likely to think they have it, may be fanatical, or selfish, or both. The moderate solution commends itself to moderate men.

The leading members of the Philadelphia Constitutional Convention knew what they wanted and they were pretty sure that what they wanted would be good for the country. There was a grave difficulty attending their deliberations, however—they disagreed rather strongly on several points. They had to compromise, to agree upon a Constitution which practically every intelligent member of the Convention thought he could improve. Of the instrument of government upon which the members of the Convention, not without misgivings, agreed, Alexander Hamilton, speaking before the New York ratification convention, said: “The truth is that the plan in all its parts, was a plan of accommodation.”¹⁰ Washington, writing to his favorite nephew and heir, Bushrod Washington, made this statement: “The warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections; but they have found them unavoidable and are sensible, if evil is likely to arise therefrom, the remedy must come hereafter. . . . I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us.”¹¹

These words of Washington not only strengthen the proposition that government is compromise, but also express a confidence in the American people, in their wisdom and character. Democracy can flourish on the wisdom of a few, if that wisdom is supported by the character of many. A few spirits like Abraham Lincoln and Justice Oliver Wendell Holmes, and others less known to fame but fit to be associated with them in

⁹ Edmund Burke, *Works* I, 500.

¹⁰ Quoted in Burton J. Hendrick, *Bulwark of the Republic* (1937), p. 90.

¹¹ Quoted, *ibid.*, p. 99.

wisdom, breadth of view, and tolerance, supported by men of good will, can make democracy work.

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APPENDIX

The Constitution of the United States

★ ★ ★

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes¹ shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.² The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three, *Massachusetts* eight, *Rhode Island and Providence Plantations* one, *Connecticut* five, *New York* six, *New Jersey* four, *Pennsylvania* eight, *Delaware* one, *Maryland* six, *Virginia* ten, *North Carolina* five, *South Carolina* five, and *Georgia* three.

4. When vacancies happen in the representation from any State the executive authority thereof shall issue writs of election to fill such vacancies.

¹ See the Sixteenth Amendment.

² "Three fifths of all other persons" referred to the slaves. See Thirteenth and Fourteenth Amendments.

5. The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III

1. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.³

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV

1. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.⁴

SECTION V

1. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do busi-

³ See the Seventeenth Amendment.

⁴ See the Twentieth Amendment, sec. 2.

ness; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION VII

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall

take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII

1. The Congress shall have power to lay and collect taxes, duties, imposts, and excise, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post-offices and post-roads;

8. To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX

1. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.
2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.
3. No bill of attainder or ex post facto law shall be passed.
4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.⁵
5. No tax or duty shall be laid on articles exported from any State.
6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.
7. No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.
8. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION X

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.
2. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.
3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION I

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:
2. Each State shall appoint, in such manner as the legislature thereof may

⁵ See the Sixteenth Amendment.

direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such a number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]⁶

3. The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

4. No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

7. Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

⁶ This paragraph was superseded by the Twelfth Amendment adopted in 1804.

SECTION II

1. The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION I

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II

1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public

ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; ⁷ between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, or other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained.

ARTICLE IV

SECTION I

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.⁸

SECTION III

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor

⁷ See the Eleventh Amendment.

⁸ This was the constitutional requirement respecting the return of fugitive slaves.

any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so constructed as to prejudice any claims of the United States or of any particular State.

SECTION IV

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of

America the twelfth. In witness whereof, we have hereunto subscribed our names.

AMENDMENTS

ARTICLE 1⁹

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury

⁹ The first ten amendments were proposed in 1789, and adopted in 1791.

shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

ARTICLE XI¹⁰

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII¹¹

The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the persons voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.¹²

The person having the greatest number of votes as Vice-President shall be

¹⁰ Proposed in 1794, adopted in 1798.

¹¹ Proposed in 1803, adopted in 1804.

¹² See the Twentieth Amendment.

the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII¹³

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV¹⁴

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the

¹³ Proposed and adopted in 1865.

¹⁴ Proposed in 1866, adopted in 1868.

loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV¹⁵

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI¹⁶

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII¹⁷

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII¹⁸

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

¹⁵ Proposed in 1869, adopted in 1870.

¹⁶ Proposed in 1909, adopted in 1913.

¹⁷ Proposed in 1912, adopted in 1913.

¹⁸ Proposed in 1917, adopted in 1919.

ARTICLE XIX ¹⁹

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XX ²⁰

SECTION 1. The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice-President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three fourths of the several States within seven years from the date of its submission.

ARTICLE XXI ²¹

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by convention in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

¹⁹ Proposed in 1918, adopted in 1920.

²⁰ Proposed in 1932, adopted in 1933.

²¹ Proposed in February, 1933, and adopted in November, 1933.

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